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82-2157

Supreme Court, U.S.
FILED
JUL 2 19
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CENTRAL STATES, SOUTHEAST and SOUTHWEST AREAS PENSION FUND and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,
Petitioners,

v.

CENTRAL TRANSPORT INC., et. al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

In implementing a field audit program in accordance with the "prudent man" rule of ERISA, may the trustees of multiemployer employee benefit funds, without being arbitrary or capricious, request access to payroll, tax, and other "pertinent records" relating to the wages, hours and duties of *all* employees of contributing employers:

1) Where the purpose of the audit is to monitor an honor system of reporting and to assure compliance with statutory and contractual obligations;

2) Where the funds must award service credits and benefits to employees on the basis of work performed under a collective bargaining agreement even in the absence of employer contributions;

3) Where records relating to an employer's complete work force are necessary to comply with standard auditing procedures;

4) Where substantial safeguards are offered to protect the confidentiality of employee records;

5) Where the trust agreements governing the funds, as construed by the trustees, authorize such audits;

6) Where, absent such audits, the trustees must rely on the discretionary efforts of unions, employees, or the Secretary of Labor to oversee employer contributions and hence to protect the actuarial solvency of the funds.

OR

May employers withhold the records of all employees except those they *concede* are covered by the collective bargaining agreement *unless* the trustees first have reasonable cause to believe other individuals perform bargaining unit work and should be reported regardless of how the employer has classified them?

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CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AND CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,
Petitioners,

v.

CENTRAL TRANSPORT, INC., et al.,[1]
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Central States, et al., respectfully petition this Court to issue a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit, entered on January 20, 1983.

OPINIONS BELOW

The opinion of the district court is reported at 522 F. Supp. 658 and is set forth in Appendix A. The opinion of the court of appeals is reported at 698 F.2d 802 and is set forth in Appendix B.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1983 (App. C). A Petition for Rehearing *en*

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[1] Respondents, collectively styled Central Transport, are: Central Transport, Inc., Central Cartage Co., Quad State Leasing, Inc., Cadillac Leasing, Inc., Dunes Leasing, Central Recapping Inc., Michiana Trucking, Inc., Company 17, Danville Illinois Leasing, Michigan Express, Mohawk Cartage, Mohawk Motor, Inc., Flint Cartage, Bancroft Freight Lines, and McKinlay Transport, Ltd. Central States originally filed suit also against Genessee Cartage; this company was omitted from the appeal.

banc was denied on April 8, 1983 (App. D). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*, as amended by the Labor Management Relations Act of 1947, 29 U.S.C. § 141, *et seq.*, and the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.*, as amended by the Multiemployer Pension Plan Amendments Act of 1980 (Pub. L. No. 96-364), are set forth in Appendix G.

STATEMENT OF THE CASE

1. Introduction

Central Transport, an interstate trucking company, like some 12,000 other employers, operates its business pursuant to collective bargaining agreements with Teamster locals. These agreements require specified weekly contributions to the Central States Health and Welfare and Pension Funds on behalf of each employee who performs bargaining unit work. The Trustees of the Central States Funds are required by ERISA to ascertain and collect all contributions owed by employers under operative collective bargaining agreements. The Trustees of the Pension Fund are also required by law to grant service credit and ultimately benefits to anyone who has performed bargaining unit work regardless of whether the employer has remitted corresponding contributions. The Trustees rely on employers to report accurately. Because many employers do not report or contribute *regularly* on behalf of some eligible employees or *at all* on behalf of others, the Trustees conduct *random* field audits to inspect employer accounts. The specific issue for review is whether, in conducting such audits, fund trustees may request and examine pertinent records relating to *all* employees in a contributing employer's work force, since it is possible for an employee to perform bargaining unit work but not be reported. The court of appeals held that they may not conduct such *general* audits. Absent reasonable cause to believe that a particular omission has occurred, the trustees are limited to the records of employees the employer concedes are "covered" by the collective bargaining agreement (A-31/32).

In its opinion, the court of appeals did not address the magnitude of the problem of misreporting to Taft-Hartley trust funds,[2] did not address the function of random general audits as a device to deter as well as to uncover delinquent contributions, did not address the need for trustee independence in this area, and departed from the standard of judicial review traditionally applied by other courts in interpreting trustee decisions under the common law of trusts which is incorporated into the "prudent man" rule of ERISA. Focusing heavily on the cost of audits and on the confidentiality of employee records, rather than on the Trustees' need to obtain verification data independently and to prevent a drain on fund assets, the court restricted the permissible scope of an audit, erected a "reasonable cause" threshold, and thus inhibited the Trustees in what they perceived to be the performance of a core fiduciary duty. In so doing, the court rejected the Trustees' contention that by limiting the records open to inspection, the *employer* would control the audit although the *Funds* would bear ultimate financial liability.

Petitioners are two of the largest trust funds in America. With assets in excess of four billion dollars, the Central States Health and Welfare and Pension Funds serve some 500,000 active workers, retirees, and their families who are dependent upon them for retirement income and health coverage and thus rely on the Trustees to determine and collect contributions, protect fund assets and otherwise assure actuarial solvency. The importance of this issue is evidenced by the fact that counsel for Petitioners have received requests to file Briefs *Amicus Curiae* in support of this Petition from more than 150 Taft-Hartley funds representing more than 8 million American workers employed in a variety of major industries throughout the United States and from a "Big Eight" accounting firm as well (App. J).

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[2] A "Taft-Hartley" trust is one established and governed in accordance with Section 302(c)(5) of the LMRA. ERISA has incorporated principles set forth in the LMRA. Important among these is equal representation of labor and management on fund Boards of Trustees, with the corresponding requirement of independent decision-making (*see NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981)).

2. The audit of Central Transport

In February, 1980, Respondents were selected for a random general audit. This was the first time the Trustees of Central States attempted to examine Central Transport's records (Appellees' Brief, p. 9; Docket entry 8), and they had no particular cause to believe Respondents were in violation of ERISA or their collective bargaining agreements. Although all 16 of the companies comprising Central Transport were admittedly engaged in the trucking industry (Appellants' Brief, p. 1), Respondents refused access to records for 60% of their work force, alleging without any substantiation that these persons were not covered by Teamster contracts, that they would never be eligible for benefits from Central States, and that their records were confidential (Aff. of R. Sigler, Director of Payrolls, A-94; Jt. App., Sixth Circuit, A-29/30, A-66/67).

Central Transport not only refused access to payroll records and other pertinent data for this group of employees; Central Transport also refused to produce any documents relevant to *concededly covered employees* if such document also contained information concerning *allegedly noncovered* employees. It thus refused to produce IRS 941 forms, although tax forms are a reliable source for the independent verification of employee earnings (Aff. of R. Sigler, *supra*, A-93/94). The auditors were asked to leave Central Transport's premises before the audit was completed (Aff. of J. Pasia; Jt. App., Sixth Circuit, A-63; A-88).

On the basis of an incomplete examination of the records only of *concededly covered employees*, the auditors determined that Central Transport engaged in four kinds of underreporting, resulting in the following alleged delinquencies: at least $172,303.50 to the Pension Fund and at least $96,059.00 to the Health and Welfare Fund (Aff. of J. O'Sullivan, Jt. App., Sixth Circuit, A-59/60; A-83/84). The court of appeals referred to these sums as "instances of underreporting" (A-17/30) and did not regard a general audit as reasonable or prudent in view of these results.

The auditors also discovered that four employees on whose behalf Central Transport was remitting contributions were not listed on the payroll pertaining to covered employees. Instead, they were listed on the office payroll (Aff. of J. Pasia, *supra*, A-87). Central Transport refused to explain why these employees were entitled to contributions when the collective bargaining agreement did not "cover" office personnel. Central Transport also refused to produce the office payroll register. Because the coverage status of these employees was unclear, the court of appeals expanded the scope of the audit to include the records of these four employees, but nevertheless asserted that general audits were arbitrary and capricious notwithstanding the fact that this kind of reporting discrepancy *illustrated* just how covered employees could be placed on an office payroll and shielded from the eyes of the auditors in accordance with Respondents' theory of confidentiality.

It is important for this Court to understand that Central States' audit of Central Transport was not "triggered" by any of the above findings, as the court of appeals concluded; these findings were the *result* of a random *limited* audit (A-17/30). Moreover, in order for the above events to be meaningful, some indication of the statutory context is necessary as are some facts concerning the internal operation of the Central States Funds and the function of audits, which facts were presented to the courts below.

3. Statutory context

In 1974, Congress enacted ERISA in an attempt to prevent the great personal tragedies that had occurred in the past when employees reached retirement age only to discover that the benefits they had worked for and expected were not available due to careless trust administration and improper funding and vesting practices.[3] Among the goals to be promoted by the new Act were: the establishment of "standards of conduct, responsibility and obligation for the fiduciaries of employee benefit plans;" adequate disclosure to participants; and adherence to minimum funding and vesting standards (29 U.S.C. § 1001).

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[3] *See Nachman Corp.* v. *PBGC*, 446 U.S. 359, 374-375 (1980).

Under ERISA, the trustees of such plans were given "exclusive authority and discretion to manage and control the assets of the plan" (29 U.S.C. § 1103), and "trustee responsibilities" were generally conceived to be "nondelegable" (29 U.S.C. § 1105). While the details of trust administration were to be set forth in mandatory written trust instruments (29 U.S.C. § 1102), the trustees were subject to an overriding statutory obligation to act "with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims" (29 U.S.C. § 1104(a)(1)(B)).

ERISA also requires pension funds to credit an employee with service toward the vesting of his benefits even where his employer never remitted corresponding contributions (29 U.S.C. §§ 1052(a)(3)(A)(C); 1053(b)(2)(A); 29 C.F.R. § 2530.220b-2(a)(1)(2). Eligiblity for participation is a function of hours worked not employer contributions.[4]

Pursuing the goals set forth in ERISA and carrying out the tasks imposed upon them, the Central States Trustees determined on the basis of years of experience in trust administration that random general audits of participating employers' tax and payroll records[5] are the single most reliable and effective means of uncovering delinquent contributions and identifying employees potentially eligible for

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[4] The Department of Labor requires that credit be given "*solely on the basis of service performed for a participating employer, regardless of whether that employer . . . has made or defaulted on his required contributions.*" Advisory Opinion Letter, 31 August 1976, BNA *Pension Reporter*, No. 221, Jan. 8, 1979, R-24 (A-71). (emphasis supplied)

[5] As used herein, a "random" audit means one in which an employer is selected without any reason to believe he is not reporting correctly. The employer does receive prior notice of the audit through an "engagement letter" from the Funds. The term "general" audit means that the Funds request access to pertinent records relating to the employer's complete work force, subject to safeguards to protect confidentiality. The records actually requested are, in fact, limited unless discrepancies arise. The first stage of the audit involves cross-checking of a company's payroll registers and IRS 941 quarterly earnings forms. If the total earnings figures match, the auditors can be certain that there are no missing payrolls that could relate to covered employees. Thereafter, the auditors request only those records necessary to comply with standard random-sampling techniques. (*infra*, p. 9).

service credits and plan benefits. Significantly, the DOL and the IRS have approved field audit programs. (Reg. 76-1, 41 F.R. 12740; March 26, 1976).

4. Audits and their function

A few facts regarding the operation of the Central States Funds in particular will explain why random general audits are crucial for all multiemployer funds.

An employer's obligation to contribute to Central States is established in the collective bargaining agreement, which the Trustees of the Funds have no role in negotiating. Upon contractually agreeing to participate in the Central States trusts, the employer submits a list of employees "covered" by the collective bargaining agreement and "eligible" for contributions.[6] This is known as the "base group" (A-6). Thereafter, Central States must rely on the employer to accurately report fluctuations in the base group (A-6), for example, by adding newly hired "covered" employees as well as by reporting terminations.

Because of the size of the Funds and the geographical distribution of their constituency, reporting and the remittance of contributions are based entirely on an honor system. Approximately 12,000 employers with employees in 40 states contribute to the two Funds pursuant to thousands of different collective bargaining agreements executed between themselves and Teamster Locals (A-30). Since the Central States Funds are based in Chicago, Illinois, there is no way for the Funds to physically monitor employer reporting absent a field audit program, and to verify that the reported amounts are correct.

While many employers report correctly, substantial discrepancies do occur, typically underreporting and nonreporting. An employer who "underreports" fails to contribute appropriately on behalf of employees he *concedes* are covered by the collective bargaining agreement and whom

[6] An employee is "covered" by the collective bargaining agreement if he performs work in a job classification defined in the contract (A-38); an employee becomes "eligible" for contributions when he fulfills other contractual criteria, typically, completion of the probationary period (App. E). Union membership is not a prerequisite for coverage (A-16).

he has at some time reported to the Funds, whether by including them in the base group or by subsequently adding their names on monthly reporting forms. An audit of the records of concededly covered employees can detect this kind of misreporting. Such an audit of Central Transport revealed underreporting in the alleged amount of $268,362.50 (A-83/84).

An employer who engages in the practice of "nonreporting" simply omits covered employees from the base group and never subsequently reports them to the Funds, thus eroding the actuarial solvency of both Funds and potentially increasing the unfunded vested benefits liability of the Pension Fund.[7] Audits of the records only of concededly covered employees (as mandated by the court of appeals) clearly cannot detect or remedy nonreporting.

Numbers best illustrate the magnitude of the problem of nonreporting. If only 10% of the 12,000 employers in the pool omit only one single employee from their contribution reports, the annual loss of income to the Pension Fund would be approximately $3,120,000.00 ($50.00 per week per employee x 52 weeks x 1,200 employers) (Petition for Rehearing *en banc*, p. 10).[8] Multiply even a fraction of this figure by 2,000 pension funds in the United States and the potential net loss is staggering.

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[7] Unfunded vested benefits liability is the amount by which nonforfeitable benefits exceed fund assets (29 U.S.C. § 1393(c)). This problem reached such serious magnitude that Congress enacted the Multiemployer Pension Plan Amendments Act of 1980 and imposed withdrawal liability for up to 20 years on employers withdrawing from multiemployer funds even if these employers no longer operated under collective bargaining agreements, or ceased doing business altogether (29 U.S.C. § 1381, *et seq.*). In that the Central States Pension Fund could be liable to employees on the basis of covered service actually performed regardless of whether contributions were ever remitted, *supra*, its unfunded vested benefits liability would naturally be increased. This would have an impact on all other employers in the pool: those who withdraw would be subject to greater withdrawal liability; those who remain would probably have to agree to increased contribution rates to sustain the "defined benefits" promised to covered employees.

[8] This formula assumes a weekly contribution rate of $50.00. Many employers, including Respondents, contribute pursuant to the National Master Freight Agreement (A-16). The current contribution rate under this contract is $55.00.

Random audits of participating employers' records, then, are intended to encourage accurate reporting, to deter contractual and statutory evasions, to protect the benefit status of all eligible plan participants, and to mitigate losses of fund assets. Moreover, they are designed to intrude as little as possible on privacy rights.

In a typical audit "pertinent records" relating to allegedly noncovered employees are limited. The auditors compare payroll registers with IRS 941 forms in order to verify that they are dealing with a "complete" employee population and that there are no missing payrolls or cash disbursements. Total dollar figures rather than individual earnings are of prime importance. If the totals match, the auditors spot-check personnel files of allegedly noncovered employees. If, on the basis of this spot-check, it appears that employees listed on the payroll for noncovered employees do not in fact perform bargaining unit work, that is the end of the audit as far as this group is concerned. Even with regard to the covered employees, the audit is limited to essential records: if two documents verify the accuracy of reporting, four will not be demanded.

Substantial safeguards are also offered to protect confidentiality.[9] However, in accordance with standard auditing principles which require at least some independent verification,[10] the audit cannot be limited solely to employer-selected records of one segment of his work force, for example, the records of those employees the employer *concedes* are covered by the collective bargaining agreement. If limited only to these records, the Trustees might never discover the existence of covered employees the employer did not report in the first place, or they might discover them only at some later time when the employer was already out of business or bankrupt, thus precluding a recoupment action as suggested by the court of appeals (A-34).

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[9] The safeguards offered by Central States will be discussed below in connection with the legitimacy of Respondents' confidentiality claims (*infra* p. 25-26). The safeguards enunciated in *Central States, Southeast and Southwest Areas Pension Fund* v. *Theut Products* (No. 82-71080 E.D. Mich. 1982), are standard. (Petition for Rehearing *en banc*; App I).

[10] *See*, for example, SEC Accounting Release No. AS-19; CCH Fed. Sec. Laws Repts. § 72,020; *see* also the American Institute of Certified Public Accountants' Statement on Auditing Standards regarding "Sufficiency of Evidential Matter" (1980) and 29 U.S.C. 1023(A-59-62).

5. Proceedings below

The district court, carefully analyzing the language of various provisions of the Trust Agreements which afford the Trustees both specific powers and broad managerial discretion, found that the Trustees had a contractual right to audit records relating to the employer's entire work force, and that this right would be enforced unless Central Transport could show an overriding interest in confidentiality (A-10). In light of the safeguards offered by Central States and the relevance of the records for the purposes requested, the court found that on balance the Trustees' need for information outweighed the employer's interest in confidentiality (A-11/12). The court then determined that ERISA supported the Trustees' request for records and that the audit demanded was neither arbitrary nor capricious (A-12/13). Central Transport was ordered to produce the records requested, and the court refused to certify its order for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Although the district court's opinion was rendered in the context of cross-motions for summary judgment, Central Transport filed an appeal under 28 U.S.C. § 1292(a)(1). The district court had assumed jurisdiction under 29 U.S.C. § 185(a) and 29 U.S.C. § 1132.

The court of appeals took jurisdiction and reversed,[11] finding neither a statutory nor a contractual basis for random general audits. While the court acknowledged that "the trustees must ensure that contributions to the Funds correlate with the disbursement of benefits from them" (A-29), and that "entitlement to Funds' benefits . . . may also be established by the judicial or arbitral process where there is no concession that an employee, or one claiming under him or her, is a covered employee," citing *Barrentine* v. *Arkansas-Best Freight System*, 450 U.S. 728 (1981), it nevertheless restricted audits to the records of concededly covered employees and to the records of *particular individuals* as to whom the Trustees had *reasonable cause* to believe they were covered regardless of how they were classified by the employer or the Union. The court did not explain how such "reasonable cause" could be generated.

[11] The decision was unanimous and the opinion relatively lengthy. However, very few authorities were cited to support the court's rulings.

Misapprehanding the purpose of the audit, as noted above, the court reasoned that on the basis of apparent "instances of underreporting for covered employees" (more than a quarter of a million dollars!) and "the receipt of monies for four employees whose coverage was not disclosed by the Union seniority list, Transport, or the Union", it would be "arbitrary and capricious" to audit "the records of all of Transport's employees" (A-30); indeed, the court stated that no "prudent man" would authorize such an audit, if only because of the "expenses" involved (A-30). In so concluding, the court appeared to elevate the cost factor above all other components of a "prudent" trustee decision (29 U.S.C. § 1104) and did so without any evidence of the cost of this particular audit or of audits in general.[12]

The court accepted as a fact that the majority of Central Transport's employees were not covered by collective bargaining agreements. However, there is no evidence in the record that this "fact" had been established or agreed to by Petitioners. (A-30)[13] Nevertheless, the court objected to the Funds' audit on confidentiality grounds without addressing the safeguards offered (A-31).

Finally, the court noted, without citing *any* authority, that the Funds would be adequately protected through the efforts either of the Union and the Secretary of Labor or of employees themselves, although the former would likewise be subject to a reasonable cause barrier while the latter might not know either of their eligibility for benefits or that their employer was not reporting, *infra*.

Although the court of appeals devoted much of its attention to the Trust Agreements governing the Central States Funds and, in its opinion, substituted its interpretation for that of the Trustees, the primary issue for review is

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[12] There is absolutely no evidence in the record as to the cost of the audit either to Central Transport or, more importantly, to the Funds. This is very significant, since the panel found that random general audits would be contrary to ERISA because of their cost; the suggestion is that such audits would be a waste of Fund assets and, for this reason, arbitrary and capricious (A-30).

[13] Allegations such as these are precisely what audits are supposed to verify! Petitioners *never* conceded the truth of this allegation. *See* Appellees' Brief, pp. 26-27.

whether the Trustees have an independent statutory right under ERISA to conduct random general audits, circumscribed by safeguards to protect confidentiality, in order to *independently* monitor reporting, to verify coverage, and to deter evasions. Or, are such audits *per se* arbitrary and capricious because they are too expensive and too intrusive, in which case *any* trust instrument purporting to authorize this procedure would be unenforceable as contrary to *ERISA* and public policy. In other words, amendment of the Central States Trust Agreements would not resolve the problem.

REASONS FOR GRANTING THIS PETITION

The court of appeals' decision should be reviewed because it is inconsistent with national pension policy and the goals of ERISA; it conflicts with the rationales of relevant decisions of this Court and of various circuits; it has departed from the correct standard of judicial review of trustee action; and it has failed to recognize the magnitude of misreporting to the Funds and thereby accorded too much weight to the confidentiality of employee records.

1. A dilution of trustee independence is contrary to the LMRA and ERISA and is inconsistent with decisions of this Court and those of various circuits.

One of the most potentially harmful aspects of the court of appeals' decision is that it dilutes the trustee independence mandated by the LMRA and ERISA. Having found that Petitioners had neither an independent statutory right to conduct random general audits nor a contractual right to do so under their Trust Agreements, the panel made a speculative assertion that the Funds' interests would be adequately protected through the efforts of Unions, employees or the Secretary of Labor (A-33). The Trustees' position is now untenable; they must not only rely on employers to report accurately and, if audited, to produce all the necessary data; they must also rely on third persons, whose activities they cannot control and whose knowledge may be limited, to monitor the honor system of reporting and protect the actuarial solvency of the Funds. This reasoning conflicts with a number of decisions of this Court and those of various circuits.

In *United Mine Workers of America Health and Retirement Funds* v. *Robinson*, 455 U.S. 562, 571-572 (1982), this Court confirmed that in enacting 302(c)(5) of the LMRA, Congress intended benefit funds to be completely independent of Union control. Reliance on the Union to protect the actuarial solvency of the Funds is inimical to Congressional intent.

ERISA did not alter this mandate of independence. Indeed, 29 U.S.C. § 1105 makes "trustee responsibilities" nondelegable. Interpreting various provisions of ERISA, including its fiduciary obligation rule, this Court imposed a strict neutrality requirement on fund trustees. *NLRB* v. *Amax Coal Co., supra*, 332-334. It thereby laid to rest the lingering belief that trustees are part of the collective bargaining process or can have dual loyalties, both to the groups appointing them and to trust beneficiaries. Reliance on the intervention of third persons whom the Trustees can not control and who may have competing interests is not only inimical to ERISA's nondelegability rule but contrary to the principles enunciated in *Amax*.

The court of appeals placed particular reliance on Union efforts in monitoring the honor system of reporting and protecting the interests of all eligible participants. Such reliance is inconsistent with decisions of this Court and of the Third, Eighth, and Fifth Circuits.

In *Rosen* v. *Hotel and Restaurant Employees, Local 274*, 637 F.2d 592 (3d Cir. 1981), *cert. denied*, 102 S. Ct. 398 (1981), the Third Circuit stated that fund trustees, not Unions, have a fiduciary duty to "oversee" employer contributions: "While the union does owe a duty of fair representation to its members (citations omitted), it does not control, nor is it in a position to oversee, the employer's contributions to the fund" (p. 599, fn. 10). Drawing upon the teaching of the Eighth Circuit in *Phillips* v. *Kennedy*, 542 F.2d 52 (8th Cir. 1976), the court stated further:

> If a trustee's fiduciary duty requires anything in the administration of the trust, it requires him to inform the pensioners of their employer's failure to make the required contributions to the fund. Continued eligibility is

> the core of the trustee beneficiary relationship and those responsible for the administration of the fund are required to notify pensioners when their employer jeopardizes their eligibility. (p. 600)

Trustees cannot notify covered employees of their eligibility or otherwise inform them of their statutory or contractual rights unless and until they first ascertain who these persons are. To the extent an employer engages in nonreporting, random general audits allow the trustees to fulfill this core fiduciary obligation.

Even if Unions were in a position to "oversee" employer reporting, the duty of fair representation to the bargaining unit as a whole might prompt them not to press claims for fringe benefits if this jeopardized base wages or jobs.

It is well established that agreements having a discriminatory effect may be legitimate for economic reasons and hence consistent with the duty of fair representation. *See Allied Chemical and Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) and *United Mine Workers* v. *Robinson, supra*. Indeed, recognizing that such decisions are legitimate, the Third Circuit stressed why Union domination of a trust fund would result in precisely the kind of conflict of interest that Section 302(c)(5) of the LMRA was designed to prevent by requiring independent neutral administration of Taft-Hartley funds. *Nedd* v. *United Mine Workers of America*, 556 F.2d 190 (3d Cir. 1977).

Consistent with this reasoning are also *Robbins* v. *Prosser's Moving and Storage Co.* and *Robbins* v. *Schneider Moving Co.*, 700 F.2d 433 (8th Cir. 1983)[14] as well as *Bugher* v. *Consolidated X-Ray Service*, 705 F.2d 1426 (5th Cir. 1983). Here, both the Eighth Circuit *en banc* and the Fifth Circuit determined that fund trustees were not required to exhaust the grievance mechanism of a collective bargaining agreement but could proceed directly to a court to collect delinquent contributions even where resolution of the dispute might involve interpretation of the governing labor contract. Underlying this position is the fact that fund

[14] Petitions for Writs of Certiorari were filed on May 17, 1983; No. 82-1860 and 82-1862.

trustees cannot compel Unions to arbitrate; thus, they should not be required to rely on their aid. As this Court made clear in *Barrentine* v. *Arkansas-Best Freight System*, 450 U.S. 728 (1981), *collective* bargaining with its spirit of compromise and the duty of fair representation under the LMRA are not necessarily consistent with the protection of *individual* rights, particularly *individual statutory rights*. Respondents did not address any of these cases; nor did the court of appeals.

The Sixth Circuit's opinion is not only inconsistent with the above line of cases; it is also belied by the *actual facts* before it in *Central Transport*: if the Union could monitor reporting and protect employee interests so effectively and so reliably, how can one explain that alleged delinquencies in excess of $268,000.00 were discovered on the basis of an incomplete audit by Central States?

The court also believed that employees could pursue their own benefit rights, suggesting that they might be estopped from claiming them if they did not (A-34). This is contrary to express policy declared in ERISA as is evidenced by the fact that a number of provisions of the statute as well as corresponding DOL regulations require trustees to provide participants with comprehensive information about their statutory and contractual rights. (29 U.S.C. §§ 1022, 1024, 1025; 29 C.F.R. § 2520.104b-1).

While constructive knowledge of existing laws is a frequently cited legal maxim, ERISA is a particularly complex statute. Indeed, in *Nachman Corp.* v. *PBGC*, *supra* at 361, this Court used the word "reticulated" to describe it. If specialist lawyers are often required to interpret this "reticulated" law, it is fundamentally unfair to expect workers who may have limited educations and in some cases may not even speak English to weave their way through its provisions. Moreover, employees may not even know they *are* participants, particularly if they perform covered and noncovered work. Or, they may be compromised into accepting paychecks without fringe benefits upon the promise of a regular job. There is no authority to suggest that this kind of compromise is tantamount to a voluntary waiver of a statutory right justifying an estoppel, particularly if economic conditions are uncertain.

The employee could, of course, go to the Union for help, provided he were aware of a problem.[15] For the reasons described above, however, the Union might or might not act. It is well established that an employee who seeks to obtain judicial review of a Union's failure to prosecute a grievance must shoulder a heavy burden. *Vaca* v. *Sipes*, 386 U.S. 171 (1967). Although this Court may have increased the Union's sensitivity to employee grievances as a result of *Bowen* v. *U.S. Postal Service*, 459 U.S. ____, 103 S. Ct. 588 (1983), a burden still exists and is substantial. In any event, Congress declared that it is the *trustees'* duty to protect employees' benefit rights.

Finally, the court of appeals suggests that the Secretary of Labor can aid the funds. Neither the legislative history of ERISA nor the text of the statute supports the idea that the Secretary's investigative activity comprehends random general audits similar to those performed routinely by the Administrator of the Wage and Hour Division of the Department of Labor under the Fair Labor Standards Act (29 U.S.C. § 211). Thus, ERISA does not authorize the Secretary *to enter* an employer's premises and inspect books and records unless he has reasonable cause to believe a violation of the statute has occurred (29 U.S.C. § 1134). Even with reasonable cause, the Secretary's investigative activity is discretionary. Given the large number of employers contributing to employee benefit plans and the manpower available to the DOL, history and logic suggest that the Secretary's intervention will be reserved for unusual situations. In fact, it appears that the major focus of DOL investigative activity has been and will continue to be plans themselves and their trustees. CCH Pension Plan Guide ¶ 25, 496 (May 19, 1983). As the Eighth Circuit observed in *Robbins* v. *Prosser*, *supra*:

> Defendants suggest that the trustees, in addition to asking the union to invoke arbitration, could also seek

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[15] Even employees whose coverage is conceded cannot know without further inquiry whether their employer is contributing correctly since contribution information does not appear on a paycheck stub. If an employee was never reported in the first place, he would never get a Summary Plan Description from the Funds, and would be even less likely to know of his rights. Such an employee would either have to know the law itself or be able to rely on the Union.

> administrative or criminal remedies, but these avenues are even more remote and uncertain than the second-hand access to arbitration that is put forward as the funds' main recourse.[16] (p. 442)

Significantly, in enacting the MEPPAA, Congress *withdrew* from the Secretary his power to institute a collection action (29 U.S.C. § 1132(b)(2), 1145).

Collecting delinquent contributions, managing fund assets, and providing adequate disclosure to plan participants are core fiduciary obligations of trustees under ERISA. Random general audits are indispensable tools for performing these obligations. The court of appeals has impeded the ability of the Trustees to shoulder their obligations fully and independently. In light of the practical effect of the decision as well as its departure not only from relevant statutes but decisions of this Court and those of various circuits, this Petition should be granted.

2. Under the correct standard of judicial review, random general audits are not arbitrary and capricious under ERISA.

a. The court of appeals limited the Trustees' right to conduct audits under the authority of ERISA by incorrectly applying the proper standard of judicial review to the "prudent man" rule: the decision not only interferes with a routine matter of trust administration but may limit the scope of discovery under the Federal Rules of Civil Procedure.

Both pre-ERISA and post-ERISA law is well established that reviewing courts may not substitute their own judgment for that of benefit fund trustees or interfere with their decisions unless these decisions are "arbitrary and capricious." *Danti* v. *Lewis*, 312 F.2d 345 (D.C. Cir. 1962); *Rehmar* v. *Smith*, 555 F.2d 1362 (9th Cir. 1976). For trustees' conduct to qualify as "arbitrary and capricious," however, the act or decision must lack substantial justification, have no basis in fact, be erroneous as a matter of law,

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[16] There is only *one* reported instance of a conviction of a private corporation and its principals for misreporting to a fund. *U.S.* v. *S & Vee Cartage*, 704 F.2d 914 (6th Cir. 1983). Interestingly, part of the evidence on which the conviction was based derived from a random general audit of the employer's payroll and tax records by the Central States Pension Fund.

be inconsistent, or be made in bad faith. These qualifications are legion in circuit decisions throughout the nation.[17]

Although definitions of what is "arbitrary and capricious" have emerged almost exclusively in the area of benefit claims where courts have scrutinized trustees' interpretations of plan documents, there is no authority to suggest that acts or decisions undertaken by trustees pursuant to the "prudent man" rule of ERISA (29 U.S.C. § 1104(a)(1)(B)) should be subject to more stringent review, so long as the trustees are acting *solely* in the interests of participants and beneficiaries. In fact, limited judicial review is consistent with the common law basis of the "prudent man" rule, as will be discussed below.

The court of appeals, however, did substitute its judgment for that of the Trustees. Without showing that random general audits were arbitrary and capricious as qualified by a majority of other courts, it created a *particularized* "reasonable cause" standard for the production of documents based on its own narrow view of relevance.[18] The decision will therefore affect not only consensual audits but also pretrial discovery.

Clearly, trustees may henceforth be required to file collection actions at the first sign of an actual delinquency and avail themselves of discovery techniques to obtain all the data they believe is necessary to verify the accuracy of reporting. This would impose heavy costs on funds and increased caseloads on courts. Even worse, courts may henceforth find that trustees are not entitled to documents through discovery that they would not be entitled to on the merits in light of *Central Transport*.[19] Should this prove to

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[17] By way of example, *see Marsh* v. *Greyhound Lines, Inc.*, 488 F.2d 278 (5th Cir. 1974); *Maness* v. *Williams*, 513 F.2d 1264 (8th Cir. 1975); *Adams* v. *N.J. Brewery Employees Pension Trust Fund, et al.*, 670 F.2d 387 (3d Cir. 1982); *Wardle* v. *Central States, Southeast and Southwest Areas Pension Fund*, 627 F.2d 820 (7th Cir. 1980) as well as *Danti* v. *Lewis*, *supra*, and *Rehmar* v. *Smith*, *supra*.

[18] Thus, substantial underreporting for concededly covered employees would not be sufficient cause to warrant the production of pertinent records for the rest of the work force; the trustees would still have to show on a case by case basis why additional records are relevant. This enhances the potential for multiple litigation.

[19] This is not a hypothetical question but one facing the district court in *Central States* v. *Theut Products*, *supra* (App. I).

be true, the effect of the Sixth Circuit's ruling will have been to create a new and unprecedented privilege for employee records not found in the Federal Rules of Evidence.

b. Random general audits are not "arbitrary and capricious" under the "prudent man" rule of ERISA.

The district court, citing a number of provisions of ERISA, found that the Trustees had a statutory right to "pursue a complete audit of the defendant Central Transport's payroll records and employment data in order to verify whether employment status has accurately been reported and benefit contributions properly made" (A-13). The court of appeals reversed, reasoning that "the statutory provisions of ERISA do not, in themselves, impose" such a duty upon the Trustees (A-19). Absent a specific *duty*, the court was unable to find a specific statutory predicate for the *right* to conduct a "complete" audit.

It is not surprising that the court of appeals failed to find an express provision in ERISA authorizing "complete" audits. Having recognized that employee benefit funds differ from each other in so many respects, the drafters of ERISA refrained from setting forth a comprehensive list of specific acts which trustees were required to perform in order to fulfill their statutory fiduciary obligations and effectively administer the assets committed to their care. Rather, ERISA contains a number of affirmative duties[20] and a few specific prohibitions (29 U.S.C. § 1106), and leaves the details of trust administration to be articulated in written trust agreements, specific to each fund.

Nevertheless, 29 U.S.C. § 1104 is a core provision of ERISA and sets forth both the fiduciary obligation and prudent man rules of the statute, which provide the measure by which Trustee activities must be gauged where an act is neither expressly commanded nor expressly prohibited.

In formulating this overriding provision, however, Congress purposefully painted with a broad brush. This is

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[20] For example, the duty to file annual reports (29 U.S.C. §§ 1023 and 1024); to furnish participants with Summary Plan Descriptions (29 U.S.C. §§ 1022, 1024, and 1025); to diversify investments (29 U.S.C. § 1104(a)(1)(C)); the duty to retain records (29 U.S.C. 1027, 1059).

because ERISA was specifically intended to codify principles applicable to the common law of trusts (A-13),[21] which would permit a maximum of flexibility and discretion and yet afford such well-established curbs on trustee conduct as good faith, reasonableness, and consistency. Audits or accountings are not only traditional and routine trustee activities,[22] but also specific to particular purposes and circumstances and therefore unsuitable for *explicit* detailed formulation in ERISA. That does not mean that the statute does not *implicitly* encompass "complete" audits. While the *power* to conduct audits of some kind may be implied from 29 U.S.C. § 1103, which gives the Trustees exclusive authority to manage and control fund assets, the *permissible scope* of the audit is precisely the kind of issue to be resolved by the "prudent man" rule of 29 U.S.C. § 1104.

Petitioners have already stated why random general audits are prudent: to deter evasions; to verify that all persons actually performing covered work are being reported; to protect the benefit status of every person entitled to coverage and disclosure under ERISA; to foster actuarial solvency; to prevent potential increases in unfunded vested benefits liability; to comply with standard auditing practices; to assure that Trustees maintain an *independent* role in the administration of the trusts. These reasons do not require further comment here. It need only be said that since these reasons are based on law *and* fact, they cannot, by definition, be arbitrary and capricious.

Random general audits by fund trustees are analogous, if not functionally equivalent, to the random inspection of records conducted by the Administrator of the Wage and Hour Division of the DOL pursuant to Section 11 of the FLSA (29 U.S.C. § 211), an Act whose remedial purposes

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[21] *See* 3 *U.S. Code and Administrative News*, 1974, p. 4651; *NLRB* v. *Amax Coal Co., supra*, pp. 332-33; *Robbins* v. *Prosser., supra*, p. 439 *et* seq.

[22] *See* Bogert, *Trusts and Trustees*, Chap. 46, *Accounting and Compensation* (2d ed. 1975). In the context of employee benefit trusts, the trustees' right to audit contributing employers' records was rarely challenged prior to 1980. (*See* Appellees' Brief, pp. 22-26). Central Transport itself conceded that there was a *single* case on point: *Central States, et al.* v. *CRST*, 641 F.2d 616 (8th Cir. 1981). *CRST* was substantially overruled by *Robbins* v. *Prosser, supra*.

and actual remedies closely parallel those of ERISA. Courts construing the inspection powers of the Administrator have rejected most of the arguments raised by Central Transport and accepted by the Sixth Circuit.

In *Fleming* v. *Montgomery Ward Co.*, 114 F.2d 384 (7th Cir. 1940), *cert. denied*, 61 S. Ct. 71 (1940), the Seventh Circuit rejected the reasonable cause standard. Analyzing the purpose of the FLSA, the court articulated a general rule that is equally applicable to the case at bar: namely, where a duty to regulate exists, facts essential to an intelligent performance of that duty cannot be withheld else the "shadow" rather than the "substance" of authority is conferred: "to limit the Secretary's right 'to inspect books to cases in which he has already obtained information justifying a formal complaint against somebody defeats the purpose of the Act'" (p. 389). This Court ultimately rejected a reasonable or probable cause standard for authorized FLSA investigations and subpoenas in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 201 (1946).

Turning to the permissible scope of a subpoena duces tecum (available to the Administrator if an employer does not voluntarily produce the records requested), the Seventh Circuit in *Montgomery Ward* also drew a number of conclusions relevant to trustee audits under ERISA.[23] Most important for the purposes of this Petition, the court rejected the employer's argument that the subpoena was unreasonable because the records requested "would include records of employees not entitled to the benefits of the Act":

> *Petitioner is not required to accept respondent's classification of employees*; and, in fact, the necessary conclusions seem to be that petitioner, in making the investigation "to determine whether any person has violated any provision of (the) Act, or which may aid in the enforcement of the provisions of (the) Act" must determine for himself, in the first instance, whether an employee of an employer subject to the Act is one entitled to the Act's benefits and whether he has received those benefits. It would be *impossible for the*

[23] For example, the Administrator could request records that were not detailed in the statute. He could also request records from the employer without first showing that they were unavailable from other sources such as from employees themselves.

> *Administrator to discharge his duties under the Act without full information* respecting the wages and hours of employees and the nature of their duties, *regardless of whether particular employees are exempt from the provisions of the Act*. (p. 392, emphasis supplied)

Nor should the Trustees, by analogy, be required to accept Central Transport's classifications and be satisfied with the records only of concededly covered employees.

Montgomery Ward was followed by the Eighth Circuit in *Cudahy Packing Co.* v. *Fleming*, 122 F.2d 1005 (8th Cir. 1941). Prior to litigation, the company had refused to produce any records unless the Wage and Hour Division first advised it of the "names of any employees concerning whom complaint had been made." A subpoena then issued which authorized the Administrator to inspect two of the employer's plants. The employer objected that one of these plants was engaged solely in intrastate commerce and hence not subject to the Act. The employer therefore challenged the subpoena. Relying on *U.S.* v. *Darby*, 312 U.S. 100, 125 (1941), in which the Supreme Court stated that "the requirement for records even of the intrastate transaction is an appropriate means to a legitimate end," the court permitted inspection at both plants: "Where an industry is subject to the Fair Labor Standards Act, the Administrator is entitled . . . to inspect the records of all of its employees, both non-exempt and exempt" (p. 1009).[24] By analogy, Petitioners should be able to inspect the records of concededly "covered" as well as allegedly "noncovered" employees.

Petitioners recognize, of course, that a distinction exists between a governmental agency and a private Board of Trustees. However, in contrast to the FLSA, Congress left the task of conducting routine audits primarily to fund trustees while assigning the DOL the responsibility of ensuring that the trustees perform their fiduciary duties (*supra*, p. 16). Thus, these trustees should not be denied access to information that is necessary for them to perform their duties "intelligently" and prudently, particularly since Con-

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[24] This decision was reversed by this Court, but only on the grounds that the Administrator's subpoena power under the Act had been invalidly delegated. 315 U.S. 785 (1942).

gress declared that employee benefit plans "are affected with a national public interest" (29 U.S.C. § 1001(a)).

The "continued well being and security of millions of employees and their dependents" and the "protection of interstate commerce" are interests that are surely as important as the interests Congress sought to protect in passing the FLSA. Random general audits promote these interests and should be allowed provided that trustees can adequately protect the employer's interest in confidentiality. Petitioners can and have done so. However, the Sixth Circuit did not even address the safeguards offered.

3. The Trustees' need for information outweighs the employer's interest in confidentiality: a review of this defense to disclosure is as necessary in the context of ERISA as it was in the context of the NLRA.

While a balancing of competing interests has led to the emergence of well-defined rules for the disclosure of confidential information to Unions in order to enable them to effectively perform their role as bargaining representatives, this technique has not yet led to equivalent disclosure standards where benefit fund trustees request information under the authority of ERISA in order to effectively perform their role as prudent fiduciaries. Nevertheless, the district court accepted, as an appropriate analogy, the relevance standards enunciated by this Court and the courts of various circuits in 8(a)(5) refusal to bargain cases, and found that on balance the Trustees' interest in verifying information on employment status through random general audits outweighed the employer's interest in protecting the confidentiality of records, given the safeguards offered by the Central States Funds to protect that interest (A-11/12).

The court of appeals accepted the NLRB disclosure rules analogy only with reluctance, and then found that Petitioners did not satisfy the relevance test or protect the interests of Central Transport or its noncovered employees. Misconstruing the purpose of the audit as a strategy "triggered" by reporting inaccuracies, the court found that "concern over the status of four employees" did not "justify an investigation into the records of all Transport's employees" (A-32). As observed above, the court inexplic-

ably failed to recognize that these findings were the *result* of the audit not its precipitating cause. Moreover, it did not even *once* address the safeguards *offered* to protect the interests of Central Transport and its employees, let alone decide whether such safeguards were sufficient and should be considered as part of a balancing test.

Most important for the purposes of this Petition, the court of appeals appeared to merge relevance and reasonable cause. Although the Trustees demonstrated why records relating to an entire work force were relevant for the limited purpose of their on-site audits, the court determined that only the records of concededly covered employees were relevant unless the Trustees had reasonable cause to believe that particular employees in the allegedly "noncovered" group were engaged in bargaining unit work, in which case the employer would be required to disclose records relating to these persons. A particularized reasonable cause standard is inconsistent with the liberal "discovery-type standard of disclosure" approved by this Court in *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432 (1967).[25]

Relevance for disclosure purposes is, of course, a threshold determination. In articulating the particularized reasonable cause standard, however, the Sixth Circuit not only put the cart before the horse by linking disclosure to the merits; it also failed to give sufficient weight to the balancing process undertaken by this Court in *NLRB* v. *Detroit Edison*, 440 U.S. 301 (1979).

In *NLRB* v. *Detroit Edison, supra*, this Court balanced the Union's need for information against the interests of an employer and its employees in the confidentiality of aptitude tests and test scores. The Union had requested this information in order to process grievances on behalf of six employees who were allegedly denied employment on the basis of their test results. Because leakage of these highly sensitive materials could destroy their usefulness and embarrass employees, the employer refused to produce them directly to the Union in the form requested. However, the

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[25] It is also inconsistent with *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149 (1956), in which this Court rejected an employer's blanket refusal to substantiate its claim that it was financially unable to meet a Union's demand for higher wages.

employer offered a number of viable alternatives which would have permitted the Union to process the grievances adequately; it also offered to produce the test results of any employee who consented to their production. The NLRB ordered direct production to the Union of all requested information, the Sixth Circuit affirmed, and this Court reversed, stressing the particular nature of the materials requested, the viability of the alternatives offered, and the minimal burden on the Union of obtaining the consent of the six employees who were the subjects of the grievance and whose actual tests scores were relevant. Most importantly, the Court observed that the employer had not "fabricated the concern for employee confidentiality only to frustrate the union in the discharge of its responsibilities."

Detroit Edison suggests that the greater the sensitivity of the information requested, the greater is the interest in confidentiality. Nevertheless, the Court did not give its approval to a naked assertion of confidentiality. If information is relevant, it must be produced in some useful form. Moreover, consent to the release of allegedly confidential information, even of a highly sensitive nature, is not a *per se* requirement for its disclosure. Rather, consent would appear to depend on the burden of obtaining it and on whether an express promise not to disclose was made.

In the case at bar, the court of appeals accepted Central Transport's naked allegation of confidentiality with regard to a majority of its employees, although no alternatives were offered to permit independent verification of the accuracy of reporting, although the burden on the Trustees of obtaining consent from these employees would have been onerous, if not impossible, although the materials requested were not of the same degree of sensitivity as aptitude tests and test scores, and although more than a quarter of a million dollars of alleged delinquencies were determined for the concededly covered group before the auditors were asked to leave the premises.

The Trustees have offered substantial safeguards to protect confidentiality: no addresses need be produced; individual salary figures for corporate officers may be deleted as long as total earnings are available; individual records of

noncovered employees may not be copied or removed from the employer's premises once the auditors determine that they do not, in fact, perform bargaining unit work; no information concerning noncovered employees may be transmitted to any third persons, including the Union, without the employer's consent; all sensitive materials such as test scores and personal information may be removed from those personnel files of noncovered employees randomly selected. (App. I).

These safeguards can be monitored by the employer; they can also be enforced through protective orders. Moreover, if this information is "leaked" to promote Union-organizing efforts or the competitive interests of rival employers (specters which Central Transport raised without a shred of evidence to show that the Trustees have *ever* transmitted audit results for such purposes), this would be a breach of the strict neutrality rule enunciated by this Court in *NLRB* v. *Amax Coal Co.*, *supra*, for which remedies are available. More to the point: fund trustees have a practical stake in promoting confidentiality so as to assure the continued cooperation of employers in monitoring an honor system from which employers themselves stand to benefit.

Before now, this Court has enhanced the Union's ability to perform its statutory duty by fashioning standards of relevance and articulating disclosure rules in the context of collective bargaining; it has done so by balancing competing interests. Petitioners now request this Court to undo the *de facto* privilege created by the court of appeals, and enhance the ability of fund trustees to perform their fiduciary obligations through a similar process of balancing.

4. The Trust Agreements governing the Central States Funds provide a contractual basis for random general audits.

The primary purpose of this appeal is to vindicate an independent statutory right. On the other hand, the two Trust Agreements governing the Central States Funds are not ordinary contracts. Rather, they function as the blueprint for centralized trust administration and affect relationships between the Trustees and thousands of employers in many jurisdictions. Because of this and because the language of these Agreements typifies that found in instru-

ments governing multiemployer funds in general, the Sixth Circuit's substitution of its interpretation for that of the Trustees is likely to affect the integrity of other trust agreements and hence trust administration throughout the United States. Review of the basis upon which the court rejected the Trustees' contractual claim is therefore warranted, particularly since amendment of the Trust Agreements would not resolve the court's objections.

In conducting random general audits, Petitioners have consistently relied on Article III, Section 5, *sentence 2* of the Trust Agreements. This provision states:

> The Trustees may, by their representatives, examine the *pertinent records* of each Employer at the Employer's place of business whenever such examination is deemed necessary or advisable by the Trustees in connection with the proper administration of the Trust" (A-46, emphasis supplied).

Exercising their power to construe the terms of the Trust Agreements, and to make these constructions binding on employers, employees, and the Union (Article IV, Section 17, A-48), the Trustees have consistently and at all stages of this litigation urged that the term "pertinent records" does not mean a limited class of "employee records"[26] but means what a plain English rendering says it means in the context used: records necessary to complete the audit in accordance with recognized procedures which prefer or require independent verification of employer assertions.[27] At a minimum, this construction could *reasonably* include records beyond those of employees the *employer* concedes are covered.

The district court upheld the Trustees' construction; the court of appeals reversed, finding that the term "pertinent records" was synonymous with the term "employee re-

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[26] Article I, Section 3(a) of the Trust Agreements defines the term "employee" as one covered by the collective bargaining agreement and eligible for contributions under the contract or applicable law (A-43). Article III, Section 5, sentence 2 *expressly does not* limit the production of records for audit purposes to those of "employees," no less to those of "concededly covered employees:" it specifies "pertinent records."

[27] *See* fn. 10, *supra*. A typical "assertion" is "completeness" of records.

cords."[28] In reaching this conclusion, the court first of all substituted the term "employee records" for the term "pertinent records," in effect *rewriting an express* provision of the Trust Agreements. It also rejected the Trustees' reasonable construction of the term "employee," which encompasses not only the "concededly covered" group but also the "*de facto* covered" group which the court itself agreed could sustain a claim for benefits, *regardless of concession*, in a court or through arbitration (A-29).[29]

In rejecting the Trustees' contractual claim, the panel departed from the limited standard of judicial review set forth above in connection with ERISA. The decision is therefore in direct conflict with *Riley* v. *MEBA Pension Trust*, 570 F.2d 406 (2d Cir. 1977), in which the Court of Appeals for the Second Circuit asserted that where a trust

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[28] Focusing on the definition of "employee" in Article I, Section 3(a), the court reasoned that if the term "employee" is construed to include "noncovered" as well as "covered" employees, then the Trustees would not merely be entitled to examine the records of "noncovered" employees but would also have to extend rights and benefits under the trusts to "noncovered" employees which would be contrary to the intent of the parties to the Trust Agreements as well as to the collective bargaining agreements. It would also be contrary to ERISA, which requires fund trustees to exercise their fiduciary obligations solely to participants and beneficiaries (A-19; 24-25).

[29] As Central States argued in their Petition for Rehearing *en banc* (pp. 7-9), the Trustees *have never asserted* that the term "employee" as used in the Trust Agreements means "covered and noncovered employee" (A-24/25). They cannot, by law, extend "coverage" under the labor agreement, "rights" under the Trust Agreements, or "benefits" in the Funds to "noncovered employees." What the Trustees *do claim* is that they have a nondelegable duty under 29 U.S.C. §§ 1104 and 1105 to look beyond lists and records of "*concededly* covered employees" in order to verify that an employer is accounting for *all covered employees* in his work force (conceded and *de facto*), particularly since it is the Funds which bear ultimate financial liability to any employee who can sustain a claim for benefits on the basis of covered employment actually performed *regardless* of whether contributions were ever or can ever be received on his behalf. In this regard, Petitioners point out the obvious: while non-participants and non-beneficiaries *are* admittedly outside the scope of the Trustees' fiduciary duty, undetected "covered" employees are not non-participants. Properly construed, the Trust Agreements are clearly *consistent* with ERISA. *See* 29 U.S.C. § 1104(a)(1)(D). It may be recalled that 29 U.S.C. § 1002(7) defines "participant" as an "employee" who is or "may become" eligible for benefits.

agreement affords trustees broad powers of construction, "the judicial role is limited to determining whether the trustees' interpretation was made rationally and in good faith, not whether it was right."

The Sixth Circuit's narrow construction of the language of the Trust Agreements was based on that set forth in *Central States* v. *CRST, supra*. As noted above, the Eighth Circuit substantially overruled this decision. Significantly, the *CRST* panel never actually rejected as meritless Central States' contention that it could not *independently* verify the accuracy of reporting without access to more complete records. However, the court stated that *it* could not "re-write" the contract; the implication is that the *Trustees* could do so.

Pursuant to Article X of the Trust Agreements, the Trustees could amend Article III, Section 5, sentence 2 to require the production of "pertinent records" for "all persons employed by the employer." The records could also be specified in detail. Such amendment might nevertheless be an exercise in futility, since the Sixth Circuit's ruling *transcends* any language in the Trust Agreements. However precisely the production request might be worded, random audits of an employer's complete work force would still involve objectionable "expenses" and would still impermissibly "intrude" on the records of persons who did not "bargain" for the instrusion (A-30).[30]

In sum, unless this Court finds that random general audits of an employer's complete work force are "prudent" under ERISA, taking into account the relevance of the information requested and the safeguards offered to protect confidentiality, employee benefit trust funds will be ill-equipped to prevent nonreporting.

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[30] Although noncovered employees cannot, by definition, "bargain" through the representative of the "covered employees," they are still part of the "public" ERISA was designed to protect.

CONCLUSION

The court of appeals' decision has placed the trustees of multiemployer employee benefit funds in an untenable position: they must shoulder their fiduciary responsibilities independently but are urged to rely on the discretionary activity of Unions and the Secretary of Labor who may be moved by competing interests of their own and over whom the trustees have no control; they must exercise these fiduciary obligations solely on behalf of participants and beneficiaries but are urged to rely on the very people whose interests they are supposed to protect; they must disclose information to plan participants whose identity they cannot necessarily ascertain; they must protect the actuarial solvency of the funds but cannot fully oversee employer contributions; they must grant credits and benefits to employees on the basis of covered employment but cannot fully verify coverage in advance of claims made; they must conserve fund assets but are faced with the possibility of conducting multiple law suits in order to pursue a routine matter of trust administration.

For all of the reasons set forth herein, Petitioners respectfully request this Court to issue a Writ of Certiorari; to give content to the prudent man and fiduciary duty rules of ERISA; to articulate a uniform standard for the judicial review of trustee action; to establish an appropriate standard of relevance and hence appropriate disclosure rules for the production of documents to trustees; and to reconfirm the principles of nondelegability and trustee independence.

Respectfully submitted,

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CENTRAL STATES, SOUTHEAST and SOUTHWEST AREAS PENSION FUND and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,
Petitioners,

v.

CENTRAL TRANSPORT INC., et. al.,
Respondents.

APPENDIX

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Appendix A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND.

Plaintiffs,

-vs-

Civil No. 80-71872

CENTRAL TRANSPORT, INC., et al.

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiffs, Central States, Southeast and Southwest Areas Pension Fund and Central States, Southeast and Southwest Areas Health and Welfare Fund, are employee benefit plans designed and maintained to serve as repositories of benefit fund contributions from companies with employees engaged in interstate trucking. The plaintiff funds will be referred to here as "Central States." Relying upon the jurisdictional grants of Section 301(a) of the Labor Management Relations Act of 1947, as amended (29 U.S.C. 185(a)), and Section 502 of the Employee Retirement Income Security Act of 1974 (hereinafter referred to as "ERISA") (29 U.S.C. 1132), Central States filed the instant complaint on behalf of its trustees, participants, and beneficiaries against 16 named defendants. The defendants, all companies engaged in interstate transportation of goods, will be referred to collectively as "Central Transport."

The gravamen of plaintiff's complaint is that Central Transport has failed to accurately report and remit benefit fund contributions for all employees covered by the collec-

tive bargaining agreements which establish the benefit plans. Central States has asked this court to issue an order permitting its auditors to conduct an independent verification of Central Transport's complete payroll records in order to determine whether the duties and status of each of its employees has been accurately reported by Central Transport. Without such an independent audit, Central States argues that it is unable to insure the financial integrity of the benefit funds and to fulfill its fiduciary obligations to the participants in and beneficiaries of the benefit plans.

On August 25, 1980, Central Transport filed a motion to dismiss plaintiff's complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Central Transport contends that Central States has neither a statutory nor a contractual right to the payroll data of all of its employees, without prior determination by the local union and the employer that particular individuals are covered by the collective bargaining agreement and thereby eligible as plan participants. Central Transport also argues that its obligation to protect the confidentiality of employee records prevents disclosure of data for those individuals who are not covered by the collective bargaining agreement.

Central States replied to the defendant's motion to dismiss, and at the same time filed its own motion for partial summary judgment, or in the alternative for a preliminary injunction to permit an audit of the defendant's payroll and employment records. The matter was set for hearing before the court. The parties then agreed on the record that the relevant facts are not in dispute and requested that the court treat their respective pleadings as cross-motions for summary judgment.

Having considered the oral and written arguments of the parties, partial summary judgment in favor of the plaintiff Central States is hereby granted. As is further discussed

below, this court finds that the plaintiff Central States has both a contractual right and a statutory obligation under the circumstances to independently verify the status and duties of all individuals employed by Central Transport in order to insure that proper benefit contribution payments are being made. The court therefore orders that Central Transport provide to the audit representatives of Central States all of the documentation requested and that the audit procedure undertaken by Central States be allowed to continue.

Each of the defendant companies are parties signatory to a collective bargaining agreement entitled the "National Master Freight Agreement" and to certain supplementary agreements with various local union affiliates of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The National Master Freight Agreement undisputedly obliges an employer to make weekly health and welfare, and pension contributions to a fund jointly administered by the union and the employer for each employee "covered by the agreement." (National Master Freight Agreement, April 1, 1979 to March 31, 1982, Article 60 and Article 61). Article 60 and Article 61[1] of the National Master Freight Agreement specify the amount of weekly health and welfare and pension benefits to be paid for each covered employee. These provisions further authorize the Central Transport employers to enter trust agreements which set forth the terms and conditions under which the benefit funds are to be administered. Significantly under Article 60 and Article 61, Central Transport agreed to ratify all action taken or to be taken by the benefit plan trustees within the scope of their authority. Thus Article 60 states:

> By the execution of this Agreement, the Employer authorizes the Employers' Associations which are parties

[1]Article 60 of the National Master Freight Agreement applies to "Health and Welfare Benefits" and Article 61 applies to the "Pension Plan." The language from each article which is significant to this court and which is quoted in its opinion is identical.

> hereto to enter into appropriate trust agreements necessary for the administration of such Fund, *and to designate the Employer Trustees under such agreement, hereby waiving all notice thereof and ratifying all actions already taken or to be taken by Trustees within the scope of their authority*. (Emphasis added).

In addition to the National Master Freight Agreement and to the Trust Agreements, Central Transport has undisputedly executed participation agreements applicable to the plaintiff Pension Funds and joint applications applicable to the plaintiff Health and Welfare Funds, which also confirm the defendant's obligation to be bound by all actions of the trustees in administering the Central States funds. Paragraph one of the Pension Fund participation agreement reads as follows:[2]

> *The Union and the Employer herein agree to be bound by*, and hereby assent to, all of the terms of the Trust Agreement creating said CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, all of the rules and regulations heretofore and hereafter adopted by the Trustees of said Trust Fund pursuant to the said Trust Agreement, and *all of the actions of the Trustees in administering such Trust Fund in accordance with the Trust Agreement and rules adopted*. (Emphasis added)

Clearly, the unambiguous language of the collective bargaining agreement, the joint application and the participation agreement executed by every Central Transport employer, binds Central Transport to the terms of the Trust Agreement and to the actions of the Trustees in administering the benefit funds.

---

[2]A provision similarly binding the union and Central Transport to the Trust Agreement and to all the actions of the Trustees in administering the Health and Welfare fund is contained in paragraph one of the joint application as well.

The Trust Agreement[3] itself delineates Central Transport's obligation to plan participants and beneficiaries and sets out the precise scope of the Trustees' power to administer the benefit funds. The court finds that the clear language of the Trust Agreement accords Central States in its capacity as Trustee the right to conduct an audit of all payroll data for those individuals whom Central Transport employs, regardless of whether the defendant considers them to be covered by the collective bargaining agreement.

Article II of the Trust Agreement establishes the Central States' funds, and creates a Board of Trustees consisting of equal numbers of employer and union representatives. (Trust Agreement Article II, Sections 1 and Section 2). Each employer is obligated to make "continuing and prompt payments to the Trust Fund as required by the applicable collective bargaining agreement . . ." (Trust Agreement Article III, Section 1). Collection of employer contributions and enforcement of payment obligations is delegated to the Trustees. (Article III, Section 4).

Article III, Section 5 of the Trust agreement requires both the employer and the union to furnish employment records and personal background information of "employees" to the Trustees upon request. In pertinent part, Article III, Section 5 states:

> Each Employer shall promptly furnish to the Trustees, upon reasonable demand, the name and current addresses of its Employees, their Social Security numbers, the hours worked by each employee (and past industry employment history in its files)[4] *and such other infor-*

---

[3]The Revised and Amended Trust Agreement for Central States, Southeast and Southwest Areas Pension Fund and the Revised and Amended Trust Agreement for Central States, Southeast and Southwest Areas Health and Welfare Fund will be referred to collectively as the "Trust Agreement." Unless noted differently the provisions cited and the language quoted by the court are identical in each agreement.

[4]This provision is not contained in Article III, Section 5 of the Health and Welfare Fund Trust agreement.

> *mation as the Trustees may reasonably require in connection with the administration of the Trust. The Trustees may, by their representatives, examine the pertinent records of each Employer at the Employer's place of business whenever such examination is deemed necessary or advisable by the Trustees in connection with the proper administration of the Trust . . .* (Article III, Section 5). (Emphasis added)

Traditionally, the Central States Funds have operated on a self-reporting basis, which required the employer to initially establish a base group of employees entitled to weekly contributions and then to inform the plaintiff monthly of any fluctuations in the employment status of individuals covered by the collective bargaining agreement. Central States relies upon the status reports of defendant employers to compute an invoice statement which it forwards to Central Transport. Thus, when the employer reports the termination or layoff of an individual formerly covered by the collective bargaining agreement, Central States will adjust its records and reduce the defendant's invoice to reflect the reported change. Conversely, when an employer reports the addition of new employees, Central States will increase the invoice by an amount which corresponds to the weekly contribution figure multiplied by the number of weekly hired employees.

On December 5, 1979, Central States mailed the following letter to Central Transport:

> Public Law, 93-406, commonly called ERISA requires us as the Fiduciary to make periodic reviews of participating employer contributions for the benefit of Plan Participants and their Beneficiaries.
>
> We would like to make this review at your offices beginning the week of November 26, 1979, with a representative of Local Union No. 124.

This review will encompass the following:

1. Determination of eligible Plan Participants covered by Collective Bargaining Agreements.

2. Verification of member history contributions.

3. Reconciliation of any account balance differences.

The records required will be the documents which support the recording of time worked and payroll computation and recording for all collective bargaining unit employees.

Our findings will be discussed with you at the completion of the review and confirmed in a written report.

During the course of the audit, Central Transport provided some payroll records for those employees whom it had determined were covered by the collective bargaining agreement. (See affidavit of Robert E. Sigler, individually and as Director of Payroll of each defendant company.) However, based upon the contention that approximately 60% of its employees were not covered by the collective bargaining agreement and therefore not eligible for benefit contribution, Central Transport refused to provide tax forms and complete payroll ledgers as requested by the Central States' auditors. The audit was terminated before completion on March 28, 1980, after the audit staff was asked to leave the Central Transport premises. Nevertheless, affidavits of two auditors engaged in the examination of Central Transport's record attest to the fact that reporting discrepancies and contribution deficiencies were discovered. (The affidavit of Juanito P. Pasia notes the discovery of reporting discrepancies relative to four specifically named individuals. In his affidavit, Manager of Central States' Field Employer Audit Department, John P. O'Sullivan, states that based upon preliminary and incomplete audit findings he believes the defendants are collectively indebted to Central States for at least $172,303.50.)

Central Transport relies upon a narrow interpretation of the term "Employee" as used in the Trust Agreement to reject Central States' demand for full payroll data and records of all individuals employed by Central Transport. Specifically, Central Transport points out that Article I, Section 3 of the Trust Agreement defines an employee as "a person who is employed under the terms and conditions of the collective bargaining agreement . . . and on whose behalf payments are required by such collective bargaining agreement." Central Transport alleges that 60% of its employees are not employed under the terms and conditions of the collective bargaining agreement and that the Trustees therefore have no obligation or right to inspect the employment data of these individuals.

The court finds that the Trust Agreement defines the term "Employee" far more broadly than Central Transport would concede, and that the defendant is therefore obliged to turn over complete payroll data for all individuals as demanded by Central States pursuant to Article III, Section 5 of the Trust Agreement. In the first place the definition of employee contained in Article I is not intended to be exclusive. Rather Article I, Section 3 states that the term "Employee" shall include any one of five alternative definitions; it does not limit the definition in any further way. Moreover, Article I, Section 3(e) is particularly broad in that it states:

> In all instances, the common law test, or the applicable statutory definition, of master-servant relationship shall control employee status.

It is apparent to the court that all individuals on an employer's payroll, whether covered by a collective bargaining agreement or not, qualify under the common law test of employee status. Consequently, the unambiguous language of the Trust Agreement itself accords Central States the right to examine the employment and payroll data of all individuals on the Central Transport payroll

under Article III, Section 5. The court further finds that the independent audit which the plaintiffs are pursuing falls squarely within the language of Article III, Section 5, which permits demand of "such other information as the Trustees may reasonable [sic] require," including examination of the "pertinent records of each Employer" as is "deemed necessary or advisable by the Trustees in connection with the proper administration of the Trust."

In addition to the language of Article III, Section 5, the Trust Agreement contains a number of other provisions which empower the Trustees to undertake an independent audit of the payroll records of all Central Transport employees. Thus Article III, Section 4 states:

> The Trustees, or such committee of the Trustees as the Board of Trustees shall appoint . . . shall have the power to demand and collect the contributions of the Employers to the Fund. Said Board of Trustees shall take such steps, including the institution and prosecution of, and intervention in, any legal proceedings as the Trustees in their discretion deem in the best interest of the Fund to effectuate the collection or preservation of contributions or other amounts which may be owed to the Trust Fund . . . (Article III, Section 4.)

Article IV, Section 9 of the Trust Agreement authorizes the Trustees to formulate and promulgate any and all rules and regulations which they deem necessary or desirable to facilitate the proper administration of the Trust. This provision also states that all such rules and regulations are binding upon the parties to the Trust Agreement, the Union and Central Transport.

Article IV, Section 14(e) empowers the Trustees, "to do all acts, whether or not expressly authorized herein, which the Trustees may deem necessary or proper for the protection of the property held hereunder." Each of these Trust Agreement provisions are broad enough to reasonably ac-

comodate the plaintiff's demand that Central Transport submit to a complete audit of its payroll records and data.

The precise scope of the trustee's power is to be found in the trust agreement, and the courts are traditionally unwilling to interfere with a trustee's decision regarding benefit fund administration *Rehmar* v. *Smith*, 555 F2d 1362 (9th Cir. 1977); *Marsh* v *Greyhound Lines*, 488 F2d 278 (5th Cir. 1974). Consequently, in the absence of fraud, action by a trustee taken pursuant to the powers accorded in the trust agreement will not be overturned unless the court finds it to be arbitrary and capricious. *Rehmar* v. *Smith, supra; Danti* v. *Lewis*, 312 F2d 345 (D.C. Cir. 1962); *Taylor* v. *Bakery and Confectionary Union and Industry International Welfare Fund*, 455 F.Supp 816 (E.D.N.C. 1978).

The plaintiff, Central States, argues that an audit is necessary in order to insure the financial integrity of the benefit funds. As Central States has pointed out, the funds are liable to participants and beneficiaries whether a particular employer makes the proper contribution or not. See ERISA, Sections 202 (a)(1)(A)(ii) and 203 (a)(2), [29 U.S.C. 1052(a)(1)(A)(ii), 29 U.S.C. 1053 (a)(2)], 29 CFR 56462, December 28, 1976, Section 2530.200b-2(a). In light of the broad grants of discretion contained in the Trust Agreement the court finds that the decision of the Central States Trustees to conduct a complete audit in order to verify Central Transport's reporting accuracy and payment compliance is not arbitrary and capricious. Accordingly, the data which Central States demands must be produced by contractual obligation, unless Central Transport is correct that the overriding considerations of confidentiality prohibit the disclosure of non-unit employee data.

In order to assess Central Transport's claims of confidentiality the court has examined the line of cases which consider an employer's obligation to disclose information to union representatives during the collective bargaining pro-

cess. Beginning with *N.L.R.B.* v. *Truitt Mfg. Co.*, 351 U.S. 149 (1956), the courts have recognized the general obligation of an employer to provide the union with the information it needs to properly perform as a bargaining representative. Particularly when the requested information concerns non-unit employees the courts have examined the question of whether the information being sought is relevant to a legitimate union need. *N.L.R.B.* v. *Rockwell-Standard Corp.*, 410 F2d 953, 957 (6th Cir. 1969). *Curtiss-Wright* v. *N.L.R.B.*, 347 F2d 61 (3rd Cir. 1965). The general approach has been to apply a liberal discovery standard to the issue of relevancy in order to evaluate each case on its facts. See *N.L.R.B.* v. *Acme Industrial Co.*, 385 U.S. 432 (1967); *Brazos Electric Power*, 101 LRRM 1003 (NLRB, 1979), enf'd 615 F2d 1100 (5th Cir. 1980).

Central Transport has failed to show that the information which Central States demands is not relevant to the independent audit being proposed. The court has already noted that the Trustees may reasonably require the payroll data information under the express terms of the Trust Agreement and the collective bargaining agreements between Central Transport and the union. Drawing upon the analogy to the collective bargaining process cases involving unions and employers, the court notes that if the union itself is entitled to relevant payroll information of non-unit employees, the plaintiff Trustees are similarly entitled to such disclosures. Those cases which Central Transport cites to support its confidentiality argument, concerning the disclosure of testing data, are not applicable to the payroll information which Central States seeks. In arriving at its conclusions, the court is mindful of the fact that Central States has repeatedly stated that confidential payroll data will not be copied or removed from the Central Transport premises once the auditors have satisfied theselves that particular individuals are not performing unit work. Bearing the plaintiff's assurances in mind, the court finds that the defendant's interest in protecting the confidentiality of its

non-unit employee records does not outweigh the Trustees' right to access to this information.

Not only does the plaintiff have a contractual right to the information it demands, but a number of statutory provisions within ERISA also mandate that Central States be allowed to pursue a complete audit in order to fulfill its non-delegable duty as a fiduciary under Section 405 (29 U.S.C. 1105). By enacting ERISA, Congress recognized the increasing economic impact which employee benefit plans have upon the well-being and security of millions of employees and their dependents. 29 U.S.C. 1001(a). Consequently, it is the declared policy of the Act to protect the interest of participants in employee benefit plans, *inter alia*, by requiring the disclosure and reporting to participants and beneficiaries of financial information and by establishing standards of conduct, responsibility and obligation for fiduciaries of employee benefit plans. 29 U.S.C. 1001(b).

Specifically, ERISA imposes upon a fiduciary the obligation to discharge its duties with the care, skill, prudence and diligence of a prudent man. Thus Section 404, (29 U.S.C. 1004 [sic]) states:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and (a) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries . . . with care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims . . .

There is no question but that trustees are fiduciaries within the meaning of the Act. 29 U.S.C. 1002(14).

ERISA legislative history indicates that the Congressional drafters refrained from delineating a precise list of powers and duties to be undertaken by fiduciaries, but

rather intended that fiduciaries be governed by the principles applicable to the common law of trusts. Introducing the conference report, Senator Harrison A. Williams, Jr., Chairman of the Senate Committee on Labor and Public Welfare commmented:

> . . . [T]he legislation imposes strict fiduciary obligations on those who have discretion or responsibility respecting the management, handling, or disposition of pension or welfare plan assets. The objectives of these provisions are to make applicable the law of trusts; to prohibit exculpatory clauses that have been used in this field; to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide effective remedies for breaches of trust. 3 United States Code and Administrative News, 1974, p. 5186.

The court has already noted that under the common law a trustee's decision in administering a benefit fund will not be disturbed unless it is arbitrary and capricious. Given the fiduciary nature of the trustee's duties to preserve and maintain the assets entrusted to it, the court finds that ERISA mandates that Central States be allowed to pursue a complete audit of the defendant Central Transport's payroll records and employment data in order to verify whether employment status has accurately been reported and benefit contributions properly made.

Finally, Central Transport argues that the plaintiff has no right to examine the records of non-unit employees because the collective bargaining agreement contemplates arbitration of coverage questions. Central Transport posits that until an individual is determined to be a member of the bargaining unit, he is not eligible for fund benefits or participation. As only the union and the employer can settle questions of unit membership under the grievance procedure provision, Central Transport believes the plaintiff is precluded from inspecting the records on non-unit

employees. The court rejects this argument for three reasons. In the first place, the Trust Agreement and accompanying collective bargaining agreements between the union and the employer all contemplate and ratify the Trustee's broad discretion to undertake all acts which Central States deems necessary and proper for the administration of the benefit funds. Secondly, since neither Central States nor its Trustees are parties to the collective bargaining agreements between the union and Central Transport, the contract grievance provisions are not applicable and can provide no recourse to plaintiffs herein. *See United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Third, the court does not agree with Central Transport's contention that the audit verification procedure amounts to a dispute over unit membership. If and when such a dispute arises, nothing in this opinion prevents the arbitration of a union membership question between the union and the employer. However, this contractual grievance procedure cannot substitute for the Trustees' right and obligation to conduct an independent audit in order to insure the financial integrity of the benefit funds charged to their administration.

Consequently, defendant's motion for summary judgment is denied and plaintiff's motion for partial summary judgment is granted consistent with this memorandum opinion and order.

IT IS SO ORDERED.

(s) ANNA DIGGS TAYLOR,
United States District Judge

Dated: OCT 19 1981

APPENDIX B

No. 81-1757

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND

and

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,

Plaintiffs-Appellees,

v.

CENTRAL TRANSPORT, INC., et al.,

Defendants-Appellants.

APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed January 20, 1983

Before: LIVELY and KENNEDY, Circuit Judges; and WILHOIT,* District Judge.

KENNEDY, Circuit Judge. Central Transport, Inc., et al. (Transport)[1] appeals from an order of the District Court

---

* Honorable Henry R. Wilhoit, Jr., United States District Court for the Eastern District of Kentucky, sitting by designation.

[1] Appellants are 16 corporate entities either directly engaged in the transportation of goods in interstate commerce or otherwise supportive of such transportation. They are collectively styled "Transport" since all are represented by the same counsel and collectively raise identical issues.

holding that Central States, Southeast and Southwest Areas Pension Fund and Central States, Southeast and Southwest Areas Health and Welfare Fund (the Funds) have a statutory and contractual right to inspect the records of *all* of Transport's employees to determine whether they are entitled to be participants in the Funds so that Transport is responsible for making contributions to the Funds on their behalf.

The Funds were created by trust agreements between multi-employer associations to which Transport belongs and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and its various locals (the Union). Transport has assented to and agreed to be bound by the trust agreements creating the respective Funds. The Funds are employee benefit plans subject to the Employee Retirement Income Security Program Act (ERISA), 29 U.S.C. §§ 1001-1461.

Transport is a signatory to the National Master Freight Agreement and/or supplemental, individual agreements to which the Union is a party. The collective bargaining agreements require that Transport make payments to the Funds on behalf of employees covered by the collective bargaining agreements. An employee is covered by the collective bargaining agreements if engaged in a job classification described in the National Master Freight Agreement and/or supplements. Union membership is not a prerequisite to coverage so that both union and non-union employees are covered if their job classification is so described. These employees are eligible for pension, health and welfare benefits from the Funds.

A substantial percentage of Transport's employees are not covered by the collective bargaining agreements. Transport is not required to make contributions to the Funds with respect to these individuals. Instead, Transport makes contributions to a company benefit pension plan which is also an ERISA plan. The present controversy relates only to an audit sought by the Funds.

In January 1980, the trustees of the Funds authorized and commenced an audit of Transport to verify the accuracy of Transport's reporting of covered employees. Concern over the accuracy of Transport's reporting was triggered by the Funds' receipt of contributions for four employees of Transport who were on the office payroll as well as instances of apparent underreporting for covered employees. In response, the Funds sought quarterly reports, insurance exception listings and other information which included many documents relating to non-covered employees outside of the scope of the collective bargaining agreements as well as those covered employees within its scope. When Transport refused to disclose information about Transport employees without a prior determination by Transport and the Union that they were actually covered by the collective bargaining agreements, the Funds terminated the audit.

The Funds instituted this action seeking a preliminary injunction to require Transport to provide the Funds with the names, current addresses and social security numbers of *all* of its employees, *i.e.* covered and non-covered, along with the hours worked and verification documents. The Funds argued it had a statutory and contractual right to inspect the records of *all* of of Transport's employees. The statutory right is allegedly derived from ERISA, 29 U.S.C. §§ 1102-1105, which delineates trustee responsibilities and powers, and 29 U.S.C. § 1059 which imposes a duty of responsibility and record keeping on employers with respect to all employees who are participants in an employee benefit plan. The contractual right is allegedly derived from Article III, section 5 of the trust agreements, which provides for the production of records and Article IV of the trust agreements which sets forth the trustees' powers and duties. The Funds also asserted a common law right to all records under general fiduciary principles. Transport contested these assertions on the grounds that the audit of all employee records was outside of the statutory provisions of ERISA and the

contractual agreements of the parties as embodied in the collective bargaining agreements and the trust agreements. Transport raised the confidentiality of non-covered employee records as a further defense.

These legal issues were presented to the District Court in the form of cross-motions for summary judgment. The District Court granted the Funds' motion for summary judgment on the grounds that covered and non-covered employees of Transport were within the definition of "employee" contained in the trust agreements and that the audit was authorized by ERISA and the contractual agreements between the parties. This decision allowed the Funds complete access to the records of all of Transport's employees. Transport appealed and the District Court granted a stay of its order pending appeal.

To the extent the District Court considered the audit of the records of all of Central's employees to be sanctioned by statute, the question is one of law and is freely reviewable. *Nash* v. *Farmers New World Life Insurance Co.*, 570 F.2d 558 (6th Cir.), *cert. denied*, 439 U.S. 822 (1978). The constructions of the collective bargaining agreements and the trust agreements also raise issues of law and are freely reviewable. *See Industrial Equipment Co.* v. *Emerson Electric Co.*, 544 F.2d 276, 283 (6th Cir. 1977). The propriety of the trustees' decision to order an audit, however, once a determination has been made that such an audit is authorized under the parties' agreements as a matter of law, is limited to a determination of whether the trustees' decision is arbitrary, capricious or in bad faith. *Van Gunten* v. *Central States, Southeast and Southwest Areas Pension Fund*, 672 F.2d 586 (6th Cir. 1982).

I. Statutory Right

The Funds allege that they have a statutory right to audit the records of all of Transport's employees under ERISA, 29 U.S.C. §§ 1102-1105. It is a declared policy of ERISA to protect the interests of participants in employee benefit plans by requiring the disclosure and reporting to participants and

beneficiaries of financial information and by establishing standards of conduct, responsibility and obligation for fiduciaries of employee benefit plans. *Id.* § 1001(b). ERISA imposes special responsibilities on the trustees who administer employee benefit plans and the employers, such as Transport, who contribute to them. Trustees have the discretion and authority to manage and control trust assets. *Id.* §§ 1102-1103. They are held to the high standards of fiduciaries, *id.* § 1104, and are governed by principles applicable to the common law of trusts. [1974] U.S. Code Cong. & Ad. News 5083.

A trustee's duties as a fiduciary, however broad, are nevertheless limited in two significant respects. Under 29 U.S.C. § 1104(a)(1), a fiduciary must "discharge his duties with respect to a plan *solely in the interest of the participants and beneficiaries* . . . ." (emphasis added). Non-participants and non-beneficiaries are outside the scope of this statutorily imposed duty. In addition, 29 U.S.C. § 1104(a)(1)(D) imposes the further restriction that a fiduciary discharge his duties "*in accordance with the documents and instruments governing the plan* insofar as such documents and instruments are consistent with the provisions of . . . [ERISA]."[2] (emphasis added) The documents and instruments governing the plan include the collective bargaining agreements entered into between Transport and the Union and the trust agreements.

The statutory provisions of ERISA do not, in themselves, impose upon trustees the duty to audit records of all of Transport's employees to independently verify whether any given employee is covered by the collective bargaining agreements. Instead, the provisions of ERISA require reference to the terms of the collective bargaining agreements and the trust agreements to determine who are the participants and

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[2] The documents and instruments covering the plan, however, must not be inconsistent with other ERISA provisions, *i.e.*, they cannot excuse a trustee's breach of his fiduciary duties, permit a trustee to engage in a transaction prohibited by 29 U.S.C. § 1106, or contain exculpatory clauses.

beneficiaries to whom statutorily imposed duties are owed and to the terms of the trust agreements to determine what the precise nature of those duties are. Therefore, the District Court erred as a matter of law in finding the audit to be statutorily authorized.

II. Contractual Duties

The Funds argue that Article III, section 5 of the trust agreements, gives it a contractual right to audit the records of all of Transport's employees. This provision states:

> **Production of Records** – Each Employer shall promptly furnish to the Trustees, upon reasonable demand, the names and current addresses of its Employees, their Social Security numbers, the hours worked by each Employee and *such other information as the Trustees may reasonably require in connection with the administration of the Trust.* The Trustees may, by their representatives, examine the pertinent records of each Employer at the Employer's place of business *whenever such examination is deemed necessary or advisable by the Trustees in connection with the proper administration of the Trust.* (emphasis added)

Contrary to the Funds' assertions and the District Court's holding, the term "employee," as used in the foregoing provision of the trust agreements, is not all-inclusive and does not comprehend *all* employees of Transport.[3] First, the collective bargaining agreements between Transport and the Union representing covered employees authorize payment to the Funds as part of the benefit package for covered employees. The agreements require Transport, as an employer, to make weekly contributions to the Funds for each employee

[3] ERISA, 29 U.S.C. § 1002(6), however, defines "employee" as any individual employed by an employer.

covered by the agreements who has been on the payroll thirty days of more. Non-covered employees are outside of the scope of the collective bargaining agreements and Transport is not obligated to make contributions on their behalf.

Second, non-covered employees of Transport are outside the definitions of "employee" contained in Article I, section 3 of the trust agreements. Article I, section 3, provides that the term "employee" as used therein shall include:

(a) A person who is employed under the terms and conditions of a collective bargaining agreement entered into between an Employer as herein defined and a Union as herein defined, and on whose behalf payments are required by such collective bargaining agreement or applicable law to be made to the Fund by the Employer; or

(b) All persons employed by the Union, upon being proposed by the Union and after acceptance by the Trustees; and as to such Union personnel the Union shall be considered as Employer, solely for the purposes of contributions, within the meaning of this Agreement and Declaration of Trust and shall, on behalf of such personnel, make payments to the Trust at the times and at the rate of payment equal to that made by any other Employer who is a party to the Trust for the same benefits; or

(c) All persons employed by the Central States, Southeast and Southwest Areas Health and Welfare Fund or by the Central States, Southeast and Southwest Areas Pension Fund upon acceptance by the Trustees; and as to such Trust personnel the Trustees shall be deemed an Employer, solely for the purpose of contributions, within the meaning of this Agreement and Declaration of Trust and shall, on behalf of such personnel, make payments to the Trust at the times and at the rate of payment equal to that made by any other Employer who is a party to the Trust for the same benefits;

(d) All persons who are Trustees of Central States, Southeast and Southwest Area Health and Welfare Fund or Central States Southeast and Southwest Areas Pension Fund upon acceptance by the Trustees, as hereinafter defined; and on behalf of such persons who are Trustees, their Employers shall make or be presently required to make contributions to the Trust at the times and at the rate of payment equal to that required by any other Employer who is a party to the Trust for the same benefits.

(e) In all instances, the common law test, or the applicable statutory definition, of master-servant relationship shall control employee status;

(f) The continuation of employee status once established shall be subject to such reasonable rules as the Trustees may adopt according to law.

The definition of employee in Article I, section 3(a) is written in the conjunctive. A person is an employee under the trust agreements if he or she is employed under the terms and conditions of a collective bargaining agreement *and* is a person, *i.e.*, a covered employee, on whose behalf payments are required by the collective bargaining agreement. A non-covered employee of Transport is neither employed under such terms and conditions nor entitled to have payments made into the Funds on his or her behalf. Non-covered employees of Transport are similarly outside the scope of Article I, section 3(b), all persons employed by the Union, and section 3(c), all persons employed by the Funds, because they are employed by neither. Nor are they trustees under section 3(d).

The use of the phrase "shall include" in Article I, section 3 does not expand the meaning of "employee" to encompass non-covered employees. In the Eighth Circuit case of *Central States, Southeast and Southwest Areas Pension Fund* v. *CRST, Inc.*, 641 F.2d 616 (8th Cir. 1981), which is factually on point with this case, the court addressed this issue as follows:

> We are aware that the term "shall *include*" is not necessarily synonymous with the term "shall *mean*." It is frequently used as a term of enlargement. In our judgment, it was so used as to those persons described in subsections (b) and (c), that is, as to the employees of the Union and trust fund personnel. However, it is obvious that insofar as subsection (a) is concerned, the definition of "employee" far from enlarging its meaning clearly *limits* it to "covered" employees, else the definition would serve no purpose whatever. It follows that the right of inspection is expressly limited to the records of "covered" employees.

Id. 618-19. We are persuaded by and concur with the Eighth Circuit's reasoning on this point.

Article I, sections 3(a), (b), (c) and (d) are provisions of inclusion. In contrast, Article I, section 3(e), on which the District Court relied, and section 3(f) are provisions of exclusion. Article 1, sections 3(e) and (f) merely qualify the employee status as defined in sections (a), (b), (c) and (d). Article I, section 3(e), limits "employee" as defined in the first four provisions to individuals who are not independent contractors or are otherwise outside of the control of the employer as determined by the common law master-servant relationship test or by statutory definition. The Funds might, for example, hire independent auditors to audit Transport's records. They would be exempt from employee status under Article I, section 3 of the trust agreements, which would absolve the trustees from any obligation to make weekly contributions to the Funds on their behalf. Similarly, Article I, section 3(f) limits employee status to individuals who do meet the requirements of the reasonable rules established by the trustees with regard to the continuation of employment status. That sections 3(e) and (f) qualify earlier provisions rather than provide an independent basis for the determination of employee status is indicated by their form, in contrast to that of earlier provisions. Article I, section 3 begins: "The

term '[e]mployee' as used herein shall include: (a) [a] person . . . (b) [a]ll persons . . . (c) [a]ll persons . . . and (d) [a]ll persons . . . ." In contrast, Article I, sections 3(e) and (f) do not contain similar language. Sections 3(a), (b), (c) and (d) are similarly joined grammatically; they are linked into a continuous thread by the use of semi-colons and use of the disjunctive "or." Sections 3 (e) and (f) are each separate sentences. Sections 3 (a), (b), (c) and (d) also differ from sections 3(e) and (f) in their substance. Section 3(f) clearly does not purport to provide an independent basis for the determination of employee status.

A determination that none of the provisions of Article I, section 3 confer employee status on Transport's non-covered employees is also supported by several arguments of construction. If, as the Funds assert, non-covered employees of Transport are employees within the meaning of Article I, section 3 for purposes of investigation and disclosure under Article III, section 5, then they must be treated as Article I, section 3 employees in every other instance in the trust agreements where the term "employee" is used. The practical consequence of such a construction is that the trustees are responsible to non-covered Transport employees just as they are to covered Transport employees and the Funds are required to treat such non-covered employees as Article I, section 3 "employees" for the purposes of the Funds' coverage and benefits. This was clearly not the intent of the parties to the collective bargaining agreements because Transport is obligated to contribute weekly sums to the Funds only for covered employees.

Limiting Article I, section 3 to covered employees of Transport is consistent with the bargained-for benefit negotiated on behalf of Transport's covered employees only. It would be incongruous if covered employees, through the Union, could negotiate provisions for themselves that invade the province of Transport's company benefit plan for non-covered em-

ployees and impinge upon the privacy of non-covered employees' records and documents.

Confining the Article I, section 3 definition of employee to covered employees of Transport provides symmetry between the definitions of "employer" in the trust agreements and the employer's responsibilities to the Funds under the collective bargaining agreements and the definitions of "employee" in the trust agreements. Under the trust agreements an employee must be employed under the terms of a collective bargaining agreement *and* be a person on whose behalf the employer is required to make contributions to the Funds. Parallel with this definition of employee, an employer under the trust agreements must be subject to a collective bargaining agreement *and* make contributions to the Funds for covered employees under the terms of a collective bargaining agreement. To include non-covered employees within the definition of employees throws out this symmetrical relationship and replaces it with one where the employer contributes to the Funds only for covered employees yet a broader class of employees, consisting of covered and non-covered employees, are subject to the Funds and have rights under them.

Finally, allowing Article I, section 3 (e) to be an independent grant of employee status rather than a qualification of sections 3(a), (b), (c) and (d), would negate the purpose of section 3(a) as it applies to Transport and sections (b) and (c) as they apply to the Union and trustees because (e) would be a broader, all encompassing provision in contrast to the narrow, more defined ones of sections 3 (a), (b), (c) and (d). The parties could easily have used the ERISA definition of employee, expressly stated that employee includes *all* employees of the employer, or placed section 3 (e) first and then narrowed it had they intended the definition of employee in the trust agreements to include non-covered employees of Transport. Because none of these alternatives were adopted and because the construction urged by the Funds works a radical extension of the definition of employee, not

only for purposes of disclosure and investigation under Article III, section 5, but for all other articles and sections in which the term appears, it cannot be said that the intent of the parties was to include non-covered employees of Transport within the definition of employee in the trust agreements.

In addition to requiring each employer to furnish the names and other specifically denominated information pertaining to employees, Article III, section 5 continues that an employer shall furnish to trustees "such other information as the Trustees may reasonably require in connection with the administration of the Trust." Trustees, through their representatives, may also examine the pertinent records of an employer at the employer's place of business whenever necessary or advisable by the trustees for the proper administration of the trust. The Funds argue that this general language in Article III, section 5 gives the trustees the power and authority to investigate and obtain information not limited to Transport's covered employees.

In *CRST, Inc.*, the Eighth Circuit addressed this general language and concluded that "[i]n . . . context, this language can only refer to information reasonably required as to 'covered' employees additional to the records specifically listed." *CRST, Inc., supra*, 619. We reach the same conclusion. Similarly, the authorization to examine pertinent records of the employer in the second sentence of Article III, section 5 is so qualified.

Therefore, the trustees do not have a contractual right to audit the records of all of Transport's employees under Article III, section 5. Non-covered employees of Transport are not employees within the meaning of Article I, section 3 of the trust agreements and therefore, neither can be nor are participants and beneficiaries of the Funds to whom the trustees owe a duty. 29 U.S.C. § 1104(a)(1). *See CRST, Inc., supra*, 618. Nor do the trustees have the per se right under the general language of Article III, section 5, to audit the records of all of Transport's employees. 29 U.S.C. § 1104(a)(1)(D).

The Funds also argue that Article IV of the trust agreements give the trustees the right to audit the records of all of Transport's employees. Article IV of the trust agreements gives the trustees the authority to control and manage the operation and administration of the trust in accordance with applicable law. Section 2 of Article IV requires the trustees to hold, manage, care for and protect the trust fund and collect the income therefrom and contributions thereto. Article IV, section 14(e) states that the "[t]rustees are . . . empowered, in addition to such other powers as are set forth herein or conferred by law . . . [t]o do all acts, whether or not expressly authorized . . . , which the [t]rustees may deem necessary or proper for the protection of the property held . . . [in trust]." With regard to their rule-making power, Article IV, section 9 provides that the trustees are authorized to formulate and promulgate any and all necessary rules and regulations which they deem necessary or desirable to facilitate the proper administration of the trust. Section 9 continues that all rules and regulations adopted by the trustees for the administration of the trust fund shall be binding on Transport and the Union, all parties dealing with the trust, and all persons claiming benefits. Article IV, section 17 provides that the trustees have the power to construe the provisions of the trust agreement and any construction adopted by them in good faith shall be binding on Transport, the Union and the employees.

The broad language of Article IV of the trust agreements does not, however, give the trustees *carte blanche* powers to undertake an audit of the records of all of Transport's employees. They are limited in their discretion by ERISA and the common law concept that a trustee may only act within the scope of his or her authority. Neither the express terms of ERISA, the collective bargaining agreements nor the trust agreements give the trustees the broad right of inspection and investigation they seek for their audit and we have already held that only employees covered by a collective bargaining

agreement may be considered "participants" in the Funds to whom fiduciary obligations are owed. We hold, however, that the terms of Article IV of the trust agreements, which are incorporated into ERISA's mandate that the trustees act in accordance with all plan documents and instruments,[4] give the trustees the power and authority to inspect Transport's books and records and question such persons as they deem necessary to enable them to determine facts relative to a particular employee's covered or non-covered status if they have reasonable cause to believe that a *particular employee* is covered by the collective bargaining agreement, i.e., is doing bargaining unit work, but has not been placed on the Union seniority list or otherwise classified by Transport or the Union as a covered employee.

A limited right of investigation and inspection beyond the express provisions of the trusts based on a "reasonable cause" standard is supported by several factors. Under Article IV, section 14(e), which is incorporated into ERISA's statutorily imposed duties by 29 U.S.C. § 1104(a)(1)(D), the trustees' express powers are augmented by implied powers to do what is necessary or proper for the protection of trust property. Under the common law of trusts, a trustees' powers are similarly divided into those that are expressly granted the trustee in the governing instruments and powers that are inferred or implied. Powers may be inferred or implied from the terms of the governing instruments read as a whole, from an express directive to accomplish a particular goal unaccompanied by express directives on the ordinary and natural means of obtaining that result, and from the purposes of the trust. Bogert, *Trusts and Trustees*, § 551 Trustee's Power in General (2d ed. 1980).

Article IV, section 2 of the trust agreements expressly requires the trustees to protect the trust fund by collecting

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[4] 19 U.S.C. § 1104.

contributions from employers such as Transport. Article IV, section 14(e) expressly requires the trustees to protect trust assets. To protect trust assets, the trustees must ensure that contributions to the Funds correlate with the disbursement of benefits from them. Entitlement to Funds' benefits may be established by a concession amongst the parties that a particular individual is a covered employee or a person otherwise entitled to the Funds' benefits. Entitlement may also be established by the judicial or arbitral process where there is no concession that an employee, or one claiming under him or her, is a covered employee. *See Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981). To ensure that sufficient contributions are collected to correlate with benefits due those employees whose coverage is uncontested and those adjudicated to be entitled to benefits by an arbitrator or court and to comport with the congressional policy of protecting employee benefit rights, some limited right of inspection and investigation may be implied both from the terms of the trust agreements and from the common law of trusts.

We determine that this limited right of inspection and investigation is confined to factual situations in which the trustees have reasonable cause to believe that a particular person is covered by a collective bargaining agreement but has not been placed on the Union seniority list or otherwise classified by Transport or the Union as a covered employee. The "reasonable cause" req rement is supported by the statutorily imposed "*prudent man*" standard contained in ERISA, 29 U.S.C. § 1104(a)(1)(B). The same statutory provision requires a trustee to discharge his duties solely in the interests of the participants and beneficiaries of the Funds and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying the *reasonable expenses* of administering the plan. *Id.* § 1104(a)(1)(A)(i-ii). Given a limited duty to investigate on one hand, there must be a concommitant duty on the other not to undertake unreasonable

investigations or inspections to pursue employee coverage or waste trust assets by unreasonably broad audits. The record as a whole indicates that the Funds are among the largest Taft-Hartley trust funds in the United States, that more than 13,000 employers participate and that they serve more than 500,000 employees whose job classifications are covered in thousands of collective bargaining agreements. The record also indicates that the majority of Transport's employees are not covered by a collective bargaining agreement. The requested audit of the records of all of Transport's employees attempted by the trustees, with its attendant intrusion into the employment records of non-covered employees who did not bargain for this intrusion, was apparently triggered in large part by the receipt of monies for four employees whose coverage was not disclosed by the Union seniority list, Transport or the Union, and instances of under reporting for covered employees. A prudent man would not authorize an audit of the records of all of Transport's employees under these circumstances. The decision to do so would be arbitrary and capricious. Nor could a determination that the expenses of such an audit be reasonable be sustained.

The reasonable cause standard also corresponds with the standard imposed on the Department of Labor in investigations of possible ERISA violations, 29 U.S.C. § 1134(a)(2).[8]

In addition, a "reasonable cause" standard protects the trustees without doing great violence to traditional labor relations. Coverage under the terms of a collective bargaining agreement has traditionally been within the province of the employer and union. The collective bargaining agreements entered into between Transport and the Union in this case contain a grievance clause which may only be invoked by Transport or the Union in the event any individual's status

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[8] It seems unlikely that Congress would have imposed a good cause predicate to investigations by the Secretary of Labor but intended that benefit fund trustees have the duty to examine all records.

as a covered or non-covered employee under the collective bargaining agreements comes into dispute. The Funds have no contractual right to participate in this dispute resolution process. The "reasonable cause" standard strikes a balance between the trustees' needs to satisfy their statutory and contractual obligations in the limited situations in which the investigation of proper Funds' contributions are warranted yet preserves the privacy and integrity of the grievance and arbitration provisions agreed to by Transport and the Union as a means of resolving questions of employee coverage.

Finally, a "reasonable cause" standard for inspection and investigation of an employee who has not been placed on the Union seniority list or otherwise classified by the Union or Transport as a covered employee, limits the possibility of intrusion into the records of non-covered employees who have not bargained for the intrusion to particular situations where the intrusion is factually warranted. This preserves and promotes confidentiality of non-covered employee records.

For the above-mentioned reasons we conclude that Article IV of the trust agreements, incorporated into ERISA, 29 U.S.C. § 1104, gives the trustees the power and authority to inspect Transport's books and records relative to the covered or non-covered status of the four employees on whose behalf Transport made weekly contributions to the Funds but who were not placed on the Union seniority list or otherwise classified by Transport or the Union as covered employees. Their decision to audit the records of these four employees under the terms of the trust agreements is neither arbitrary nor capricious. They may also examine records relating to admittedly covered employees which are necessary to determine when their coverage began and ended or the proper amount of contributions. They may also be entitled to other records such as drivers' logs which relate only to covered employees. It would appear that all truck drivers employed by Transport are covered by the collective bargaining agreements. Under the "reasonable cause" standard, however, we

find the trustees' attempt of an audit of the records of all of Transport's other non-covered employees to be arbitrary and capricious. An audit of the records of all of Transport's employees is outside of their statutorily and contractually imposed duties, express or implied, as a matter of law and the District Court erred in construing the agreements to the contrary.

III. NLRB Disclosure Rules

The Funds argue that they have a right to all employee information by analogy to the NLRB disclosure rules. 29 U.S.C. § 158 imposes a statutory duty to bargain collectively and fairly. The courts have concluded that this duty to bargain includes a duty to provide, upon request, information relevant to bargainable issues. *NLRB* v. *Rockwell-Standard Corp., Transmission and Axle Division, Forge Division,* 410 F.2d 953, 957 (6th Cir. 1969). The Funds argue that this concept applies by analogy to allow it to obtain information on all Transport employees. The standard of disclosure in labor cases is distinguishable here for several reasons: this case involves multi-employer benefit plans, not collective bargaining agreements, and the Funds are trustees, not parties to the collective bargaining process. Even if the standard of disclosure in labor cases is applied by analogy, that standard requires that the solicitor of such information bear the burden of showing relevance and satisfying the reviewing tribunal that the rights of the company whose information is to be disseminated are taken into account. *Kroger Co.* v. *NLRB,* 399 F.2d 455, 457 (6th Cir. 1968). Again, concern over the status of four employees is urged to justify an investigation into the records of all Transport's employees. This does not satisfy the relevancy test nor protect the interest of Transport's non-covered employees or Transport.

IV. Impact on Duties of The Trustees and the Funds

In bringing this suit, the trustees have argued that they and the Funds would be subject to liability if they are prevented from undertaking the sweeping and generalized audit they have attempted. Therefore, the right of investigation and inspection they have requested should be honored. While the issue of whether the trustees could breach their fiduciary duties by failing to conduct such an audit is not before us, nor is the Funds' liability to a participant for whom no employer contribution has been made, it would appear that both the trustees and the Funds are adequately protected. With respect to the personal liability of the trustees for an alleged breach of fiduciary duty, we note that a trustee may only act within the scope of his or her authority. To the extent that authority is limited by law, as we have found the trustees' ability to investigate and inspect under the statute and contractual provisions is limited in the case on appeal, there can be no breach of duty by the trustees for failing to undertake a more sweeping audit. A trustee may properly rely on limits to his or her authority imposed by the trust agreement and by law. *See Central States, Southeast and Southwest Area Pension and Health and Welfare Funds* v. *McNamara Motor Express Co., Inc.*, 503 F. Supp. 96, 101 (W.D. Mich. 1980).

The Funds enjoy a number of protections against being called upon to dispense benefits to a participant on whose behalf no contributions or insufficient contributions were made. The Funds and the Secretary of Labor may inspect and investigate employee records where coverage is unclear under the "reasonable cause" standard. 29 U.S.C. § 1134. Further, the Union has a strong interest in seeing that Transport's employees are within the collective bargaining agreements. Employees also have a strong interest in being included in the collective bargaining unit. The reporting requirements of 29 U.S.C. § 1021 may be expected to put an employee on

notice of his or her participant or nonparticipant status. An employee seeking benefits in such a case might be subject to an estoppel argument. Finally, the Funds, if liable, may well have a recoupment action against an employer for unpaid contributions. Therefore, we determine that the possibility of liability alone on the part of the trustees or the Funds does not justify the broad audit they seek because adequate protections appear to exist to protect them.

Accordingly, the judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

APPENDIX C
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 81-1757

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,

Plaintiffs-Appellees,

vs.

CENTRAL TRANSPORT, INC., et al.,

Defendants-Appellants.

Before: LIVELY and KENNEDY, *Circuit Judges;* and WILHOIT, *District Judge.*

JUDGMENT
(Filed: January 20, 1983)

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby reversed and the case is remanded for further proceedings consistent with the opinion of this Court.

It is further ordered that Defendants-Appellants recover from Plaintiffs-Appellees the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

Appendix C

ENTERED BY ORDER OF THE COURT
John P. Hehman, *Clerk*
(s) John P. Hehman, *Clerk*

A True Copy.

Attest:
(s) Linda L. Brinson
Deputy Clerk

Issued as Mandate:
April 18, 1983

COSTS: NONE

Filing fee ..... $
Printing ..... $
Total ..... $

APPENDIX D
No. 81-1757

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CENTRAL STATES, SOUTHEAST and SOUTHWEST AREAS PENSION FUND, and CENTRAL STATES, SOUTHEAST and SOUTHWEST AREAS HEALTH and WELFARE FUND,
Plaintiffs-Appellees,

v.

CENTRAL TRANSPORT, INC., et al.,
Defendants-Appellants.

ORDER
(Filed: April 8, 1983)

Before: LIVELY and KENNEDY, *Circuit Judges;* and WILHOIT,* *District Judge.*

The Court not having favored rehearing en banc in this case, the petition for rehearing is referred to our panel for disposition.

Upon consideration, IT IS ORDERED that the petition for rehearing be and hereby is DENIED.

ENTERED BY ORDER OF THE COURT
(s) John P. Hehman
Clerk

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* Honorable Henry R. Wilhoit, Jr., United States District Court for the Eastern District of Kentucky, sitting by designation.

APPENDIX E
Relevant provisions from the National Master Freight Agreement, 1976-1979:*

ARTICLE 2.
Scope of Agreement
Section 1.
Master Agreement

The execution of this Natl. Master Frt. Agreement on the part of the Employer shall cover all operations of the Employer which are covered by this Agreement, and shall have application to the work performed within the classifications defined and set forth in the Agreements supplemental hereto.

ARTICLE 54.
Health and Welfare Benefits

Effective April 1, 1976, the Employer shall contribute to the CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND, which is to be administered jointly by the parties, the sum of twenty-four dollars and fifty cents ($24.50) per week for each employee covered by this Agreement who has been on the payroll thirty (30) days or more. Effective April 1, 1977, the weekly contribution shall be increased to twenty-seven dollars and fifty cents ($27.50). Effective April 1, 1978, the weekly contribution shall be increased to twenty-nine dollars and fifty cents ($29.50).

Employers presently making payments to the CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND and Employers who may subsequently begin to make payments to such Fund, shall continue to make such payments for the life of this Agreement.

By the execution of this Agreement, the Employer authorizes the Employers' Associations which are parties

hereto to enter into appropriate trust agreements necessary for the administration of such Fund, and to designate the Employer Trustees under such agreement, hereby waiving all notice thereof and ratifying all actions already taken or to be taken by such Trustees within the scope of their authority.

If an employee is absent because of illness or off-the-job injury and notifies the Employer of such absence, the Employer shall continue to make the required contributions for a period of four (4) weeks. If an employee is injured on the job, the Employer shall continue to pay the required contributions until such employee returns to work; however, such contributions shall not be paid for a period of more than twelve (12) months. If an employee is granted a leave of absence, the Employer shall collect from said employee, prior to the leave of absence being effective, sufficient monies to pay the required contributions into the Health and Welfare Fund during the period of absence.

There shall be no deduction from equipment rental of owner-operators by virtue of the contributions made to the Health and Welfare Fund, regardless of whether the equipment rental is at the minimum rate or more, and regardless of the manner of computation of owner-operator compensation.

Contributions to the Health and Welfare Fund must be made for each week on each regular employee even though such employee may work only part time under the provisions of this Agreement, including weeks where work is performed for the Employer but not under the provisions of this Agreement, and although contributions may be made for those weeks into some other health and welfare fund.

If any employee on the seniority list is worked a day in any work week either as a replacement or supplemental employee, the Employer shall pay the full weekly contribution for that work week.

Contributions shall be made for any regular employee on layoff who is worked one (1) day in any week for any reason.

Action for delinquent contributions may be instituted by either the Local Union, the Area Conference or the Trustees.

Employers who are delinquent must also pay all attorney's fees and costs of collections.

Effective May 17, 1976, the Employer shall pay to all casual employees an additional fifty (50) cents per hour up to a maximum of four dollars ($4.00) for any shift that such casual employee works. This payment will be in lieu of contributions to the Central States, Southeast and Southwest Areas Health and Welfare Fund and will not be subject to any premium pay provisions of this Supplemental Agreement.

ARTICLE 55.
Pensions

Effective April 1, 1976, the Employer shall contribute to the CENTRAL STATES, SOUTHEAST, and SOUTHWEST AREAS PENSION FUND the sum of twenty-five dollars ($25.00) per week for each employee covered by this Agreement who has been on the payroll thirty (30) days or more. Effective April 1, 1977, the weekly contributions shall be increased to twenty-eight dollars ($28.00) per week. Effective April 1, 1978, the weekly contribution shall be increased to thirty-one dollars ($31.00).

This fund shall be the CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND. There shall be no other pension fund under this Agreement for operations under this Agreement or for operations under the Southern Conference Area Agreements to which Employers who are party to this Agreement are also parties.

Appendix E

By the execution of this Agreement, the Employer authorizes the Employer's Associations which are parties hereto to enter into appropriate trust agreements necessary for the administration of such Fund, and to designate the Employer Trustees under such agreement, hereby waiving all notice thereof and ratifying all actions already taken or to be taken by such Trustees within the scope of their authority.

If an employee is absent because of illness or off-the-job injury and notifies the Employer of such absence, the Employer shall continue to make the required contributions for a period of four (4) weeks. If an employee is injured on the job, the Employer shall continue to pay the required contributions until such employee returns to work; however, such contributions shall not be paid for a period of more than twelve (12) months.

If an employee is granted a leave of absence, the Employer shall collect from said employee, prior to the leave of absence being effective, sufficient monies to pay the required contributions into the Pension Fund during the period of absence.

There shall be no deduction from equipment rental of owner-operators by virtue of the contributions made to the Pension Fund, regardless of whether the equipment rental is at the minimum rate or more, and regardless of the manner of computation of owner-operator compensation.

Contributions to the Pension Fund must be made for each week on each regular employee, even though such employee may work only part-time under the provisions of this Agreement, including weeks where work is performed for the Employer but not under the provisions of this Agreement, and although contributions may be made for those weeks into some other pension fund. Contributions shall be made for any regular Employee on lay-off who is worked one (1) day in any week for any reason.

Appendix E

If any employee on the seniority list is worked a day in any work week either as a replacement or supplemental employee, the Employer shall pay the full weekly contribution for that work week.

Effective May 17, 1976, the Employer shall contribute to the Central States, Southeast, and Southwest Areas Pension Fund the sum of six dollars ($6.00) for each tour of duty each casual employee works.

Action for delinquent contributions may be instituted by either the Local Union, the Area Conference or the Trustees. Employers who are delinquent must also pay all attorney's fees and costs of collection.

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*Included in the Sixth Circuit "Joint Appendix"

APPENDIX F
Relevant provisions of the Trust Agreement governing the Central States Pension Fund*

ARTICLE I
DEFINITION OF TERMS

Sec. 3. Employee — The term "Employee" as used herein shall include:

(a) A person who is employed under the terms and conditions of a collective bargaining agreement entered into between an Employer as herein defined and a Union as herein defined, and on whose behalf payments are required by such collective bargaining agreement or applicable law to be made to the Fund by the Employer; or

(b) All persons employed by the Union, upon being proposed by the Union and after acceptance by the Trustees; and as to such Union personnel the Union shall be considered an Employer solely for the purposes of contributions within the meaning of this Agreement and Declaration of Trust and shall, on behalf of such personnel, make payments to the Trust at the times and at the rate of payment equal to that made by any other Employer who is a party to the Trust for the same benefits; or

(c) All persons employed by the Central States, Southeast and Southwest Areas Pension Fund or Central States, Southeast and Southwest Areas Health and Welfare Fund upon acceptance by the Trustees; and as to such Trust personnel the Trustees shall be deemed an Employer, solely for the purpose of contributions, within the meaning of this Agreement and Declaration of Trust and shall, on behalf of such personnel, make payments to the Trust at the times and at the rate of payment equal to that made by any other Employer who is a party to the Trust for the same benefits.

(d) All persons who are Trustees of Central States, Southeast and Southwest Areas Pension Fund or Central States, Southeast and Southwest Areas Health and Welfare Fund upon acceptance by the Trustees, as hereinafter defined; and on behalf of such persons who are Trustees, their Employers shall make or be presently required to make contributions to the Trust at the times and at the rate of payment equal to that required by any other Employer who is a party to the Trust for the same benefits.

(e) In all instances the common law test, or the applicable statutory definition; or master-servant relationship shall control employee status.

(f) The continuation of employee status once established shall be subject to such reasonable rules as the Trustees may adopt according to law.

ARTICLE III
CONTRIBUTIONS AND COLLECTIONS

Sec. 1. Amount of Contributions — Each Employer shall make continuing and prompt payments to the Trust Fund as required by the applicable collective bargaining agreement between the parties. The obligation to make such contributions shall continue during periods when the collective bargaining agreement is being negotiated, but such contributions shall not be required in case of strike after contract termination, unless the parties mutually agree otherwise.

Sec. 3. Receipt of Payment and Other Property of Trust — The Trustees are hereby designated as the persons to receive the payments heretofore or hereafter made by the Employers to the Trust Fund, and the Trustees are hereby vested with all right, title and interest in and to such moneys and all interest accrued thereon, and are authorized to receive and be paid the same. The Trustees agree to receive all such payments, deposits, moneys, insurance and

annuity contracts, and other assets and properties described or referred to in Article II and this Article, and to hold same in Trust hereunder for the uses and purposes of the Trust herein created.

Sec. 4. Collections and Enforcement of Payment — The Trustees, or such committee of the Trustees as the Board of Trustees shall appoint, or the Executive Director when directed by such committee or by the Trustees, shall have the power to demand and collect the contributions of the Employers to the Fund. Said Board of Trustees shall take such steps, including the institution and prosecution of, and intervention in, any legal proceedings as the Trustees in their discretion deem in the best interest of the Fund to effectuate the collection or preservation of contributions or other amounts which may be owed to the Trust Fund, without prejudice, however, to the rights of the Union to take whatever steps which may be deemed necessary for such purpose. The Trustees are authorized to receive all Employer contributions and apply such contributions first to any interest due, and then to the oldest unpaid balance of contributions due. Nothing herein shall give any Employer the right to designate how any contributions shall be applied.

Sec. 5. Production of Records — Each Employer shall promptly furnish to the Trustees, upon reasonable demand the names and current addresses of its Employees, their Social Security numbers, the hours worked by each Employee and past industry employment history in its files and such other information as the Trustees may reasonably require in connection with the administration of the Trust. *The Trustees may, by their representatives, examine the pertinent records of each Employer at the Employer's place of business whenever such examination is deemed necessary or advisable by the Trustees in connection with the proper administration of the Trust.* All Employers shall annually furnish to the Trustees, if requested by them, a statement showing whether:

(a) the organization is a corporation and the names of all of its officers;

(b) if not a corporation, a certificate stating that it is either a partnership or an individual proprietorship and the names of the partners or the name of the individual proprietor.

The Union will comply with any reasonable request of the Trustees to examine those records of the Union which may indicate the employment record of any Employee whose status is in dispute. The names and addresses of participants and beneficiaries are confidential information not to be disclosed by the Trustees except as required by an order of a court of competent jurisdiction, except where necessary for determination of benefits in accordance with the provisions of this Trust Agreement, or as required by law.

(emphasis supplied)

Appendix F

ARTICLE IV
POWERS AND DUTIES OF TRUSTEES

Sec. 1. The Trustees shall have authority to control and manage the operation and administration of the Trust in accordance with applicable law.

Sec. 2. The Trustees shall hold, manage, care for, and protect the Trust Fund and collect the income therefrom and contributions thereto, except to the extent that any of these functions or responsibilities are assigned to another entity or entities pursuant to any provision of this Article.

Sec. 6. The Trustees shall engage one or more independent qualified public accountants and enrolled actuaries to perform all services required by and in accordance with applicable law and such other services as the Trustees deem necessary.

Sec. 9. The Trustees are hereby authorized to formulate and promulgate any and all necessary rules and regulations which they deem necessary or desirable to facilitate the proper administration of the Trust, provided the same are not inconsistent with the terms of the Agreement, and the Articles in the Central States, Southeast and Southwest Areas Agreements creating the Pension Fund. All rules and regulations adopted by action of the Trustees for the administration of the Trust Fund shall be binding upon all parties hereto, all parties dealing with the Trust, and all persons claiming any benefits hereunder.

Sec. 14. The Trustees are hereby empowered, in addition to such other powers as are set forth herein or conferred by law:

• • • •

(e) To do all acts, whether or not expressly authorized herein, which the Trustees may deem necessary or proper for the protection of the property held hereunder.

Sec. 17. The Trustees, by majority action, shall have the power to construe the provisions of this Agreement and the terms and regulations of the Pension Plan; and any construction adopted by the Trustees in good faith shall be binding upon the Union, Employees and Employers.

ARTICLE V
CONTROVERSIES AND DISPUTES

Sec. 2. All questions or controversies, of whatsoever character, arising in any manner or between any parties or persons in connection with the Fund or the operation thereof, whether as to any claim for any benefits preferred by any participant, beneficiary, or any other person, or whether as to the construction of the language or meaning of the rules and regulations adopted by the Trustees or of this instrument, or as to any writing, decision, instrument or accounts in connection with the operation of the Trust Fund or otherwise, shall be submitted to the Trustees, or to a committee of Trustees, and the decision of the Trustees or of such committee thereof shall be binding upon all persons dealing with the Fund or claiming any benefit thereunder. To the extent this section is contrary to or inconsistent with the June 30, 1977 Agreements, this section shall be inapplicable.

ARTICLE XIII
VESTING OF RIGHTS

The Trustees shall establish standards for the vesting of benefits which conform to no less than the minimum standards required by law. No Employee or other person shall have any vested interest or right in the Trust Fund except as provided by the Trustees in conformance with applicable law.

Appendix F

ARTICLE XIV
MISCELLANEOUS

Sec. 4. Non-payment by an Employer of any moneys due shall not relieve any other Employer from his obligation to make payment. In addition to any other remedies to which the parties may be entitled, an Employer shall be obligated to pay interest at the rate of eight (8) per cent per annum on the moneys due to the Trustees from the date when the payment was due to the date when the payment is made, together with all expenses of collection incurred by the Trustees, including, but not limited to, attorneys' fees and such fees for late payment as the Trustees determine and as permitted by law.**

Sec. 7. This Agreement shall in all respects be construed according to and governed by the laws of the State of Illinois, including but not limited to the laws applicable to the rate of interest in the State of Illinois, except as such laws may be preempted by the laws and regulations of the United States.

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* The Trust Agreement for the Central States Health and Welfare Fund contains almost identical provisions.

** This Section has been amended to conform with 29 U.S.C. 1132(g)(2), enacted on September 26, 1980.

APPENDIX G

I. LABOR-MANAGEMENT RELATIONS ACT

§ 186. Restrictions on financial transactions

Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

Request, demand, etc., for money or other thing of value

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept,

any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

Exceptions

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assign-

ment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended

to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: *Provided*, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; or (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further*, That no such legal service shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited

from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959.

II. EMPLOYEE RETIREMENT INCOME SECURITY ACT

§ 1001. Congressional findings and declaration of policy

(a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated

benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.
Pub.L. 93-406, Title I, §2, Sept. 2, 1974, 88 Stat. 832.

§ 1021. Duty of disclosure and reporting

Summary plan description and information to be furnished to participants and beneficiaries

(a) The administrator of each employee benefit plan shall cause to be furnished in accordance with section 1024(b) of this title to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan—

(1) a summary plan description described in section 1022(a)(1) of this title; and

(2) the information described in section 1024(b)(3) and 1025 (a) and (c) of this title.

Plan description, modifications and changes, and reports to be filed with Secretary of Labor

(b) The administrator shall, in accordance with section 1024(a) of this title, file with the Secretary—

(1) the summary plan description described in section 1022(a)(1) of this title;

(2) a plan description containing the matter required in section 1022(b) of this title;

(3) modifications and changes referred to in section 1022(a)(2) of this title;

(4) the annual report containing the information required by section 1023 of this title; and

(5) terminal and supplementary reports as required by subsection (c) of this section.

§ 1022. Plan description and summary plan description

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title.

(2) A plan description (containing the information required by subsection (b) of this section) of any employee benefit plan shall be prepared on forms prescribed by the Secretary, and shall be filed with the Secretary as required by section 1024(a)(1) of this title. Any material modification in the terms of the plan and any change in the information described in subsection (b) of this section shall be filed in accordance with section 1024(a)(1)(D) of this title.

(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title).

§ 1023. Annual reports

Publication and filing

(a)(1)(A) An annual report shall be published with respect to every employee benefit plan to which this part applies. Such report shall be filed with the Secretary in accordance with section 1024(a) of this title, and shall be

made available and furnished to participants in accordance with section 1024(b) of this title.

(B) The annual report shall include the information described in subsections (b) and (c) of this section and where applicable subsections (d) and (e) of this section and shall also include—

(i) a financial statement and opinion, as required by paragraph (3) of this subsection, and

(ii) An actuarial statement and opinion, as required by paragraph (4) of this subsection.

• • • •

(3)(A) Except as provided in subparagraph (C), the administrator of an employee benefit plan shall engage, on behalf of all plan participants, an independent qualified public accountant, who shall conduct such an examination of any financial statements of the plan, and of other books and records of the plan, as the accountant may deem necessary to enable the accountant to form an opinion as to whether the financial statements and schedules required to be included in the annual report by subsection (b) of this section are presented fairly in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year. Such examination shall be conducted in accordance with generally accepted auditing standards, and shall involve such tests of the books and records of the plan as are considered necessary by the independent qualified public accountant. The independent qualified public accountant shall also offer his opinion as to whether the separate schedules specified in subsection (b)(3) of this section and the summary material required under section 1024(b)(3) of this title present fairly, and in all material respects the information contained therein when considered in conjunction with the financial statements taken as a whole. The opinion by the independent qualified public accountant shall be made a part of the annual report.

In a case where a plan is not required to file an annual report, the requirements of this paragraph shall not apply. In a case where by reason of section 1024(a)(2) of this title a plan is required only to file a simplified annual report, the Secretary may waive the requirements of this paragraph.

(B) In offering his opinion under this section the accountant may rely on the correctness of any actuarial matter certified to by an enrolled actuary, if he so states his reliance.

(C) The opinion required by subparagraph (A) need not be expressed as to any statements required by subsection (b)(3)(G) of this section prepared by a bank or similar institution or insurance carrier regulated and supervised and subject to periodic examination by a State or Federal agency if such statements are certified by the bank, similar institution, or insurance carrier as accurate and are made a part of the annual report.

• • • •

(4)(A) The administrator of an employee pension benefit plan subject to the reporting requirement of subsection (d) of this section shall engage, on behalf of all plan participants, an enrolled actuary who shall be responsible for the preparation of the materials comprising the actuarial statement required under subsection (d) of this section. In a case where a plan is not required to file an annual report, the requirement of this paragraph shall not apply, and, in a case where by reason of section 1024(a)(2) of this title, a plan is required only to file a simplified report, the Secretary may waive the requirement of this paragraph.

(B) The enrolled actuary shall utilize such assumptions and techniques as are necessary to enable him to form an opinion as to whether the contents of the matters reported under subsection (d) of this section—

(i) are in the aggregate reasonably related to the experience of the plan and to reasonable expectations; and

(ii) represent his best estimate of anticipated experience under the plan.

The opinion by the enrolled actuary shall be made with respect to, and shall be made a part of, each annual report.

• • • •

Financial statement

(b) An annual report under this section shall include a financial statement containing the following information:

(1) With respect to an employee welfare benefit plan: a statement of assets and liabilities; a statement of changes in fund balance; and a statement of changes in financial position. In the notes to financial statements, disclosures concerning the following items shall be considered by the accountant: a description of the plan including any significant changes in the plan made during the period and the impact of such changes on benefits; a description of material lease commitments, other commitments, and contingent liabilities; a description of agreements and transactions with persons known to be parties in interest; • • • •

Information to be furnished by administrator

(c) The administrator shall furnish as a part of a report under this section the following information:

(1) The number of employees covered by the plan.

• • • •

Actuarial statement

(d) With respect to an employee pension benefit plan (other than (A) a profit sharing, savings, or other plan, which is an individual account plan, (B) a plan described in section 1081(b) of this title, or (C) a plan described both in section 1321(b) of this title and in paragraph (1), (2), (3), (4), (5), (6), or (7) of section 1081(a) of this title) an annual report under this section for a plan year shall include a complete actuarial statement applicable to the plan year which shall include the following:

(1) The date of the plan year, and the date of the actuarial valuation applicable to the plan year for which the report is filed.

(2) The date and amount of the contribution (or contributions) received by the plan for the plan year for which the report is filed and contributions for prior plan years not previously reported.

(3) The following information applicable to the plan year for which the report is filed: the normal costs, the accrued liabilities, an identification of benefits not included in the calculation; a statement of the other facts and actuarial assumptions and methods used to determine costs, and a justification for any change in actuarial assumptions or cost methods; and the minimum contribution required under section 1082 of this title.

(4) The number of participants and beneficiaries, both retired and nonretired, covered by the plan.

• • • •

(7) A certification of the contribution necessary to reduce the accumulated funding deficiency to zero.

(8) A statement by the enrolled actuary—

(A) that to the best of his knowledge the report is complete and accurate, and

(B) the requirements of section 1082(c)(3) of this title (relating to reasonable actuarial assumptions and methods) have been complied with.

(9) A copy of the opinion required by subsection (a)(4) of this section.

(10) Such other information regarding the plan as the Secretary may by regulation require.

(11) Such other information as may be necessary to fully and fairly disclose the actuarial position of the plan.

Such actuary shall make an actuarial valuation of the plan for every third plan year, unless he determines that a more

frequent valuation is necessary to support his opinion under subsection (a)(4) of this section.

§ 1024. Filing and furnishing of information

Filing of annual report, plan description, summary plan description, and modifications and changes with Secretary

(a)(1) The administrator of any employee benefit plan subject to this part shall file with the Secretary—

(A) the annual report for a plan year within 210 days after the close of such year (or within such time as may be required by regulations promulgated by the Secretary in order to reduce duplicative filing);

(B) the plan description within 120 days after such plan becomes subject to this part and an updated plan description, no more frequently than once every 5 years, as the Secretary may require;

(C) a copy of the summary plan description at the time such summary plan description is required to be furnished to participants and beneficiaries pursuant to subsection (b)(1)(B) of this section; and

(D) modifications and changes referred to in section 1022(a)(2) of this title within 60 days after such modification or change is adopted or occurs, as the case may be.

• • • •

(4) The Secretary may reject any filing under this section—

(A) if he determines that such filing is incomplete for purposes of this part; or

(B) if he determines that there is any material qualification by an accountant or actuary contained in an opinion submitted pursuant to section 1023(a)(3)(A) or section 1023 (a)(4)(B) of this title.

(5) If the Secretary rejects a filing of a report under paragraph (4) and if a revised filing satisfactory to the Secretary is not submitted within 45 days after the Secretary makes his determination under paragraph (4) to reject the filing, and if the Secretary deems it in the best interest of the participants, he may take any one or more of the following actions—

(A) retain an independent qualified public accountant (as defined in section 1023(a)(3)(D) of this title) on behalf of the participants to perform an audit,

(B) retain an enrolled actuary (as defined in section 1023(a)(4)(C) of this title) on behalf of the plan participants, to prepare an actuarial statement,

(C) bring a civil action for such legal or equitable relief as may be appropriate to enforce the provisions of this part, or

(D) take any other action authorized by this subchapter.

The administrator shall permit such accountant or actuary to inspect whatever books and records of the plan are necessary for such audit. The plan shall be liable to the Secretary for the expenses for such audit or report, and the Secretary may bring an action against the plan in any court of competent jurisdiction to recover such expenses.

Publication of summary plan description and annual report to participants and beneficiaries of plan

(b) Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

(1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary, plan description, and all modifications and changes referred to in section 1022(a)(1) of this title—

(A) within 90 days after he becomes a participant, or (in the case of a beneficiary) within 90 days after he first receives benefits, or

(B) if later, within 120 days after the plan becomes subject to this part.

The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, every fifth year after the plan becomes subject to this part an updated summary plan description described in section 1022 of this title which integrates all plan amendments made within such five-year period, except that in a case where no amendments have been made to a plan during such five-year period this sentence shall not apply. Notwithstanding the foregoing, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, the summary plan description described in section 1022 of this title every tenth year after the plan becomes subject to this part. If there is a modification or change described in section 1022(a)(1) of this title, a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan.

(2) The administrator shall make copies of the plan description and the latest annual report and the bargaining agreement, trust agreement, contract, or other instruments under which the plan was established or is operated available for examination by any plan participant or beneficiary in the principal office of the administrator and in such other places as may be necessary to make available all pertinent information to all participants (including such places as the Secretary may prescribe by regulations).

(3) Within 210 days after the close of the fiscal year of the plan, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, a copy of the statements and schedules, for such fiscal year,

described in subparagraphs (A) and (B) of section 1023(b)(3) of this title and such other material as is necessary to fairly summarize the latest annual report.

(4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence.

Statement of rights

(c) The Secretary may by regulation require that the administrator of any employee benefit plan furnish to each participant and to each beneficiary receiving benefits under the plan a statement of the rights of participants and beneficiaries under this subchapter.

§ 1025. Reporting of Participant's benefit rights

Statement furnished by administrator to participants and beneficiaries

(a) Each administrator of an employee pension benefit plan shall furnish to any plan participant or beneficiary who so requests in writing, a statement indicating, on the basis of the latest available information—

(1) the total benefits accrued, and

(2) the nonforfeitable pension benefits, if any, which have accrued, or the earliest date on which benefits will become nonforfeitable.

§ 1027. Retention of records

Every person subject to a requirement to file any description or report or to certify any information therefor

under this subchapter or who would be subject to such a requirement but for an exemption or simplified reporting requirement under section 1024(a)(2) or (3) of this title shall maintain records on the matters of which disclosure is required which will provide in sufficient detail the necessary basic information and data from which the documents thus required may be verified, explained, or clarified, and checked for accuracy and completeness, and shall include vouchers, worksheets, receipts, and applicable resolutions, and shall keep such records available for examination for a period of not less than six years after the filing date of the documents based on the information which they contain, or six years after the date on which such documents would have been filed but for an exemption or simplified reporting requirement under section 1024(a)(2) or (3) of this title. Pub.L. 93-406, Title I, § 107, Sept. 2, 1974, 88 Stat. 850.

§ 1059. Recordkeeping and reporting requirements

(a)(1) Except as provided by paragraph (2) every employer shall, in accordance with regulations prescribed by the Secretary, maintain records with respect to each of his employees sufficient to determine the benefits due or which may become due to such employees. The plan administrator shall make a report, in such manner and at such time as may be provided in regulations prescribed by the Secretary, to each employee who is a participant under the plan and who—

(A) requests such report, in such manner and at such time as may be provided in such regulations,

(B) terminates his service with the employer, or

(C) has a 1-year break in service (as defined in section 1053 (b)(3)(A) of this title).

The employer shall furnish to the plan administrator the information necessary for the administrator to make the reports required by the preceding sentence. Not more than one report shall be required under subparagraph (A) in any

12-month period. Not more than one report shall be required under subparagraph (C) with respect to consecutive 1-year breaks in service. The report required under this paragraph shall be sufficient to inform the employee of his accrued benefits under the plan and the percentage of such benefits which are nonforfeitable under the plan.

(2) If more than one employer adopts a plan, each such employer shall, in accordance with regulations prescribed by the Secretary, furnish to the plan administrator the information necessary for the administrator to maintain the records and make the reports required by paragraph (1). Such administrator shall maintain the records and, to the extent provided under regulations prescribed by the Secretary, make the reports, required by paragraph (1).

(b) If any person who is required, under subsection (a) of this section, to furnish information or maintain records for any plan year fails to comply with such requirement, he shall pay to the Secretary a civil penalty of $10 for each employee with respect to whom such failure occurs, unless it is shown that such failure is due to reasonable cause.

§ 1052. Minimum participation standards

• • • •

(3)(A) For purposes of this section, the term "year of service" means a 12-month period during which the employee has not less than 1,000 hours of service. For purposes of this paragraph, computation of any 12-month period shall be made with reference to the date on which the employee's employment commenced, except that, in accordance with regulations prescribed by the Secretary, such computation may be made by reference to the first day of a plan year in the case of an employee who does not complete 1,000 hours of service during the 12-month period beginning on the date his employment commenced.

(C) For purposes of this section, the term "hour of service" means a time of service determined under regulations prescribed by the Secretary.

§ 1053. Minimum vesting standards

(a) Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

• • • •

(b)(1) In computing the period of service under the plan for purposes of determining the nonforfeitable percentage under subsection (a)(2) of this section, all of an employee's years of service with the employer or employers maintaining the plan shall be taken into account • • • •

(2)(A) For purposes of this section, except as provided in subparagraph (C), the term "year of service" means a calendar year, plan year, or other 12-consecutive month period designated by the plan (and not prohibited under regulations prescribed by the Secretary) during which the participant has completed 1,000 hours of service.

(B) For purposes of this section, the term "hour of service" has the meaning provided by section 1052(a)(3)(C) of this title.

• • • •

29 C.F.R. 2530.200b-2

§ 2530.200b-2 Hour of service.

(1) An hour of service is each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer during the applicable computation period.

Appendix G

DEPARTMENT OF LABOR ADVISORY OPINION LETTERS ON DELINQUENT CONTRIBUTIONS*

August 31, 1976
Opinion 76-89
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(Re: 10 Civil Actions)

Dear Mr. Dower:

The Secretary of Labor has been served with copies of complaints filed on your behalf in the above-cited cases. While at the present time we do not propose to exercise our right to intervene in any of these cases pursuant to section 502 (h) of the Employee Retirement Income Security Act of 1974 (ERISA), we nonetheless wish to inform you of our views on two matters referred to in your complaints.

> Paragraph 11 of each of your complaints states:
> Unless the Pension Fund receives the contributions due it and can credit the same to the Defendant's employees, those employees will not be entitled to credit for hours worked which will result in their ineligibility for pension benefits upon retirement.

Without expressing any opinion on the law as it existed prior to the effective date of the Employee Retirement Income Security Act of 1974 (ERISA), I would advise you that in our opinion the substance of the position expressed in that paragraph is not lawful under ERISA. ERISA sections 202, 203, and 204, 29 U.S.C.A. §§1052, 1053 and 1054, set minimum participation, vesting and benefit accrual standards which are binding on all covered pension plans. All three sections provide that the satisfaction of their requirements be based solely on each participant's years of service. A "year of service" is defined as the completion of 1,000 hours of service within a designated 12-month period.

The definition of the term "hour of service" was specifically reserved for determination by the Secretary of Labor through appropriate regulations.

On September 8, 1975, a definition of the term "hour of service" was published in the *Federal Register*. Section 2530.200b-2(a)(1) states, "An hour of service is each hour for which an employee is directly or indirectly paid, or entitled to payment, by the employer for the performance of duties during the applicable computation period . . ." Although the Department of Labor will be making certain modifications in these regulations, none of the proposals under consideration would cause a change *in our present position that credit must be given solely on the basis of service performed for a participating employer, regardless whether that employer is required to contribute for such service or has made or defaulted on his required contributions. Any plan term or Trustees' resolution to the contrary is, in our judgment, unlawful and unenforceable.*

• • • •

Published by
THE BUREAU OF NATIONAL AFFAIRS, INC.,
WASHINGTON, D.C. 20037

December 5, 1978

OPINION 78-28 A

202
203
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404(a)
406
408(c)
410(a)

Harry A. Dower, Esq.
Dower, Yarema & Co., P.C.
First Valley Bank Building
Center Square
P.O. Box 950
Allentown, Pennsylvania 18105

Re: Central Pennsylvania Teamsters Pension Fund and Teamsters Local 429 Health and Welfare Fund

Dear Mr. Dower:

This is in response to your correspondence of April 18, 1977, May 24, 1977, and August 8, August 16, August 21,

August 31, and November 9, 1978, in which among other matters you request advisory opinions regarding the collection of delinquent employer contributions and the crediting of service in a pension benefit plan under the Employee Retirement Income Security Act of 1974 (ERISA). In addition, you request an advisory opinion regarding the compensation of the trustees of the subject plans. You have supplied us with plan documents and other information. . . . . .

With respect to the first matters mentioned above, you request an opinion whether a multiemployer pension plan may provide that a participant shall accrue benefits only upon the payment of contributions by the employer required to make such contributions. You also request an opinion whether there is an extension of credit by a multiemployer plan to a party in interest where a contributing employer is delinquent in making its required contribution to the plan and the trust instrument provides that the trustees of the plan have no obligation to collect delinquent employer contributions. In connection with this request you also inquire whether the trustees, in the exercise of their discretion under the trust instrument, may adopt a policy not to sue for the collection of delinquent employer contributions.

With regard to the question of whether benefit accrual may be limited to hours for which contributions are received, sections 202, 203 and 204 of ERISA set forth the minimum standards for participation, vesting and benefit accrual. The Department is of the view that, at least for purposes of participation and vesting, credit may not be limited to service for which contributions are actually made. Where no distinction is made between credit for vesting and credit for accrual, all credit must be given solely on the basis of service performed for an employer sponsoring the plan, regardless whether that employer is required to con-

tribute for such service or has made or defaulted on his required contributions.[1] Accordingly, those provisions of the plan documents you submitted which limit employee entitlement by reference to the receipt of employer contributions are not, in our opinion, lawful under ERISA.

Concerning the collection of delinquent employer contributions, you argue that nothing in ERISA directly obligates plan trustees to collect such contributions. You further argue that it is only in connection with an extension of credit by a plan to a party in interest, prohibited under section 406(a)(1)(B) of ERISA, that the question arises. Your letter concludes that, in a multiemployer plan, where the terms of the plan state that no benefit credit will be given until a contribution is actually received by the plan even though a participant has performed the required hours of service, there is no extension of credit to a party in interest and therefore no prohibited transaction.

We do not agree with your argument that, because the plan does not become obligated to pay benefits with respect to particular service until the relevant contribution is received, failure to collect the contribution does not result in an extension of credit by the plan. This is because we do not agree with your premise that benefit credit can be withheld until the contribution is received. As stated above, it is the opinion of the Department that credit must be given on the basis of service, regardless of whether the employer is required to contribute for such service or has made or defaulted on required contributions.

Moreover, in Prohibited Transaction Exemption 76-1 (41 FR 12740, March 26, 1976), the Department stated that multiple employer plans which do not establish and implement reasonable, diligent and systematic collection procedures may be found to be engaging in prohibited transactions under sections 406 and 407(a) of ERISA. The Department also stated that arrangements, agreements or under-

standings whereby a multiple employer plan agrees to the late or delayed payment of employer contributions or payment of less than the full amount of a delinquent contribution, or writes off such a contribution as uncollectable, may also constitute prohibited transactions under those sections.

The collective bargaining agreement which you forwarded to this office requires, in Articles 49 and 50, that employers make contributions to the welfare plan and the pension plan, respectively. The plan trustees are in a position to enforce that duty on behalf of the two plans, and their failure to do so could, in our judgment, result in a violation of section 404(a) of ERISA. To the extent that section 404(a) imposes upon the trustees a duty to collect delinquent contributions, any provision in the plan instruments purporting to relieve the trustees of that duty, or of the power to carry it out, is void under section 410(a).

§ 1102. Establishment of plan

Named fiduciaries

(a) (1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

Requisite features of plan

(b) Every employee benefit plan shall—

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the

*emphasis supplied

objectives of the plan and the requirements of this subchapter,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 1105(c)(1) of this title),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

§ 1103. Establishment of trust

Benefit plan assets to be held in trust; authority of trustees

(a) Except as provided in subsection (b) of this section, all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 1102(a) of this title or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan,

• • • •

§ 1104. Fiduciary duties

(a) (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter.

§ 1105. Liability for breach of co-fiduciary

Circumstances giving rise to liability

(a) In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

Assets held by two or more trustees

(b)(1) Except as otherwise provided in subsection (d) of this section and in section 1103(a)(1) and (2) of this title, if the assets of a plan are held by two or more trustees—

(A) each shall use reasonable care to prevent a co-trustee from committing a breach; and

(B) they shall jointly manage and control the assets of the plan, except that nothing in this subparagraph (B) shall preclude any agreement, authorized by the trust instrument, allocating specific responsibilities, obligations, or duties among trustees, in which event a trustee to whom certain responsibilities, obligations, or duties have not been allocated shall not be liable by reason of this subparagraph (B) either individually or as a trustee for any loss resulting to the plan arising from the acts or omissions on the part of another trustee to whom such responsibilities, obligations, or duties have been allocated.

(2) Nothing in this subsection shall limit any liability that a fiduciary may have under subsection (a) of this section or any other provision of this part.

(3)(A) In the case of a plan the assets of which are held in more than one trust, a trustee shall not be liable under paragraph (1) except with respect to an act or omission of a trustee of a trust of which he is a trustee.

(B) No trustee shall be liable under this subsection for following instructions referred to in section 1103(a)(1) of this title.

Allocation of fiduciary responsibility; designated persons to carry out fiduciary responsibilities

(c)(1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

(2) If a plan expressly provides for a procedure described in paragraph (1), and pursuant to such procedure any fiduciary responsibility of a named fiduciary is allocated to any person, or a person is designated to carry out any such responsibility, then such named fiduciary shall not be liable for an act or omission of such person in carrying out such responsibility except to the extent that—

(A) the named fiduciary violated section 1104(a)(1) of this title—

(i) with respect to such allocation or designation,

(ii) with respect to the establishment or implementation of the procedure under paragraph (1), or

(iii) in continuing the allocation or designation; or

(B) the named fiduciary would otherwise be liable in accordance with subsection (a) of this section.

(3) For purposes of this subsection, the term "trustee responsibility" means any responsibility provided in the plan's trust instrument (if any) to manage or control the assets of the plan, other than a power under the trust instrument of a named fiduciary to appoint an investment manager in accordance with section 1102(c)(3) of this title.

Investment managers

(d)(1) If an investment manager or managers have been appointed under section 1102(c)(3) of this title, then, notwithstanding subsections (a)(2) and (3) and subsection (b) of this section, no trustee shall be liable for the acts or omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager.

(2) Nothing in this subsection shall relieve any trustee of any liability under this part for any act of such trustee.

§ 1106. Prohibited transactions

(a) Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

• • • •

(B) lending of money or other extension of credit between the plan and a party in interest;

• • • •

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

• • • •

§ 1145. Delinquent contributions

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with the law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

(Pub.L. 93-406, Title I, § 515, as added Pub.L. 96-364, Title III, § 306(a), Sept. 26, 1980, 94 Stat. 1295.)

§ 1132. Civil enforcement

Persons empowered to bring civil action

(a) A civil action may be brought—

• • • •

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

• • • •

(b)(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

§ 1134. Investigative authority

(a) The Secretary shall have the power, in order to determine whether any person has violated or is about to violate any provision of this subchapter or any regulation or order thereunder—

(1) to make an investigation, and in connection therewith to require the submission of reports, books, and records, and the filing of data in support of any information required to be filed with the Secretary under this subchapter, and

(2) to enter such places, inspect such books and records and question such persons as he may deem necessary to enable him to determine the facts relative to such investigation, if he has reasonable cause to believe there may exist a violation of this subchapter or any rule or regulation issued thereunder or if the entry is pursuant to an agreement with the plan.

APPENDIX H
UNITED STATES DISTRICT COURT*
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,
Plaintiffs,

vs.

CENTRAL TRANSPORT, INC., et al.,
Defendants.

Case No. 80-71872
Hon. Anna Diggs Taylor

RUSSELL N. LUPLOW (P16863)
CHARLES J. TAUNT (P24589)
Attorneys for Plaintiffs

PATRICK A. MORAN (P17591)
DANIEL F. BERRY (P24864)
Attorneys for Defendants

AFFIDAVIT OF JOHN P. O'SULLIVAN

STATE OF MICHIGAN)
) ss.
COUNTY OF OAKLAND)

John P. O'Sullivan, being first duly sworn, deposes and states as follows:

1. That he is currently employed as the Manager of the Field Employer Audit Department of the Central States, Southeast and Southwest Areas Pension and Health and Welfare Funds, Plaintiffs herein. In such capacity he has primary supervisory responsibility for field audits of employers who participate in the Plaintiff Funds.

2. Affiant has primary supervisory responsibility for Plaintiffs' attempted audit of Defendants which took place between February 4, 1980 and March 28, 1980.

3. As a result of Plaintiffs' preliminary and incomplete findings as of the present date, Plaintiffs have been able to determine that substantial sums are owed from Defendants to Plaintiffs for pension and health and welfare contributions on behalf of Defendants' employees.

4. Affiant has determined, as a result of the preliminary and incomplete audit findings secured during the attempted audit of Defendants, that Defendants (collectively) are indebted to Plaintiff Pension Fund for at least the amount of One Hundred Seventy-two Thousand Three Hundred Three and 50/100 ($172,303.50) Dollars. As an example and by way of illustration and not by way of limitation, Defendants (collectively) are indebted to Plaintiff Pension Fund in the following amounts:

a. $58,679.50 as a result of Defendants' failure to report newly hired employees to Plaintiff on a timely basis;

b. $36,530.50 as a result of Defendants' reporting to Plaintiff of premature termination dates for their employees;

c. The sum of $5,530.00 as a result of Defendants' failure to remit contributions on behalf of employees who worked part of a week during which those employees were on strike;

d. The sum of $933.00 as a result of Defendants' failure to submit contributions to Plaintiff on behalf of employees who were on sick leave under circumstances which required Defendants to make contributions to Plaintiff.

5. Affiant has determined, as a result of the preliminary and incomplete audit findings secured during the attempted

audit of Defendants, that Defendants (collectively) are indebted to Plaintiff Health and Welfare Fund for at least the amount of Ninety-six Thousand Fifty-nine ($96,059.00) Dollars. As an example and by way of illustration and not by way of limitation, Defendants (collectively) are indebted to Plaintiff Health and Welfare Fund in the following amounts:

a. $34,034.00 as a result of Defendants' failure to report newly hired employees to Plaintiff on a timely basis;

b. $17,735.00 as a result of Defendants' reporting to Plaintiff of premature termination dates for their employees;

c. $2,911.50 as a result of Defendants' failure to remit contributions on behalf of employees who worked part of a week during which those employees were on strike;

d. $303.00 as a result of Defendants' failure to submit contributions to Plaintiff on behalf of employees who were on sick leave under circumstances which required Defendants to make contributions to Plaintiff.

Further affiant says not.

(s) John P. O'Sullivan

Subscribed and sworn to before me
this 3rd day of September, 1980.

(s) Susan Elaine Gierak, *Notary Public*,
Wayne County, MI. My commission
expires: 3-19-83.

Appendix H

AFFIDAVIT OF JUANITO P. PASIA

STATE OF MICHIGAN)
) ss.
COUNTY OF OAKLAND)

Juanito P. Pasia, being first duly sworn, deposes and states as follows:

1. That he is currently employed as an In-Charge Auditor by the Employer Audit Department of the Central States, Southeast and Southwest Areas Pension Fund and Central States, Southeast and Southwest Areas Health and Welfare Fund (hereinafter collectively referred to as "Central States").

2. That he was a member of Plaintiffs' audit team which attempted to perform an audit of the various corporate Defendants during the period February 4, 1980 through March 28, 1980.

3. During the course of Plaintiffs' attempted audit of the Defendants, Plaintiffs' auditors were directed to communicate with Mr. Robert Sigler as the representative of the corporate Defendants.

4. All requests for information, records, and documentation by Plaintiffs were directed to Mr. Sigler.

5. The only documents which Defendants voluntarily supplied to Plaintiffs during the course of the attempted audit were:

a. Defendants' payroll registers for those individuals upon whom Defendants contend they are under a legal obligation to submit contributions to Plaintiffs;

b. Defendants' insurance exception listing. This is a document generated by Defendants on a monthly basis which lists those individuals and time periods for which Defendants contend they are under a legal obligation to

make contributions to Plaintiffs as well as other employee benefit plans;

c. Defendants' 941 reporting form for the period April 1, 1977 through June 30, 1977 only;

d. Road driver attendance record. This document lists some, but not all, of the truck drivers employed in some of Defendants' special handling division and indicates, on a weekly basis, whether the individuals worked during a given week;

e. Employee Billing Change and Correction Forms. These are documents which are submitted to Plaintiffs on a monthly basis to advise Plaintiffs of changes in the employment status for those individuals for whom Defendants contend they are under a legal obligation to submit contributions to Plaintiffs. The originals of all of these documents had previously been submitted to Plaintiffs;

f. Plaintiffs' monthly bills to Defendants;

g. Remittance forms for the Michigan Conference of Teamsters Welfare Fund. This Welfare Fund is an employee benefit plan which is separate, distinct and unrelated to Plaintiffs;

h. Check vouchers for checks previously sent to Plaintiffs;

i. Defendants' worksheets supporting their monthly remittances to Plaintiffs.

6. The documents listed in the preceding numbered paragraphs 5(c) through 5(g) were of no use whatsoever to Plaintiffs in their attempt to conduct an audit of Defendants.

7. Defendants refused to provide any additional papers, records, documents or documentation other than as set forth in paragraph 5.

8. Prior to the commencement of the audit Defendants had reported to Plaintiffs that the following individuals were employed by them pursuant to a collective bargaining agreement which required contributions to be made on their behalf to Plaintiffs. Defendants had, in fact, submitted contributions to Plaintiffs for these individuals:

a. Edward Dowgiert, Social Security No. 384-14-1295;

b. Norman Surowiec, Social Security No. 278-20-4953;

c. Leonard Szpara, Social Security No. 380-24-6916; and

d. E. Cunningham, Social Security No. 296-01-6153.

These individuals were not included in either the payroll register or the insurance exception listing which Defendants provided to Plaintiffs' audit team. Affiant questioned Mr. Sigler regarding these individuals and was told that contributions were, in fact, due and owing to Plaintiffs for these persons; however, they were not included in the payroll register or insurance exception listing because they were maintained on an "office payroll". Defendants refused to provide any further information regarding these persons and, likewise, refused to provide Plaintiffs with a copy of or access to the "office payroll".

9. On March 28, 1980 Plaintiffs' audit staff was ordered to vacate the premises at approximately 10:00 a.m. Plaintiffs' auditors left shortly thereafter and have not been allowed to return.

Further affiant says not.

(s) Juanito P. Pasia

Subscribed and sworn to before me
this 3rd day of September, 1980.

(s) Susan Elaine Gierak, *Notary Public*,
Wayne County, MI. My commission
expires: 3-19-83.

Appendix H

AFFIDAVIT OF ROBERT E. SIGLER

STATE OF MICHIGAN)
) ss
COUNTY OF MACOMB)

Robert E. Sigler, being first duly sworn deposes and says:

1. I am now, and continuously since March, 1976 have been, the Director of Payroll of each of the above-referenced Defendant companies (hereinafter collectively the "Company"). I have reviewed the Company's Motion to Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted and Memorandum in Support. I am personally familiar with the facts stated therein and if called as a witness I can testify from personal knowledge as to those facts, which facts are true to the best of my knowledge information and belief.

2. I am making and filing this Affidavit, both individually and on behalf of the Company and in support of the Company's aforementioned Motion.

3. I am not a member of any union, nor am I an employee of any unit at the Company which is covered by a collective bargaining agreement, which may make me eligible for participation and benefits under the above-referenced Plaintiffs' Trust Funds (hereinafter collectively the "Trust Fund"). Furthermore, approximately sixty (60%) percent of the Company's employees are not members of any union and are not covered by any collective bargaining agreement and, therefore, are not eligible for contributions made to the Trust Fund by the Company.

4. As an employee of the Company I am aware that the Company maintains an employment record in my name. Since the initiation of my employment with the Company I have always considered my employment records confidential and I know that the Company treats those records as confidential. I believe I have a right to keep my employ-

ment records confidential and I particularly object to the Company providing either the Trust Fund on [sic] the Teamsters Union involved with my employment records without my written consent. I will not give my consent in this case.

5. To my knowledge all of the Company's employees' records are treated by the Company as confidential and the Company will not release those records or any portion thereof to any third party without first obtaining written consent of the particular employee or without first being served with an appropriate court order.

6. The Company has offered and continues to offer to provide the Trust Fund with the employment records of its employees covered by the applicable collective bargaining agreement. The Company will also provide the Trust Fund with the appropriate seniority lists, union dues checkoff lists, and employment information on any named individuals on whom the Trust Fund can establish that contributions have been made at any time, provided that the Company can obtain the necessary releases from those individuals.

7. To my knowledge the Company is not delinquent on any covered employees contributions. The Trust Fund has not advised the Company of any such delinquency or deficiency.

FURTHER, DEPONENT SAITH NOT.

(s) Robert E. Sigler, individually

(s) Robert E. Sigler
Director of Payroll of each Defendant Company

STATE OF MICHIGAN)
) ss.
COUNTY OF MACOMB)

On this 19 day of June, 1980 before me, the undersigned, a Notary Public in and for Macomb County, Michigan, personally appeared Robert E. Sigler, to me known, who, being by me first duly sworn, did say that he is the Director of Payroll of each of the companies so listed as Defendants in the above-captioned action, and the individual executing the within and foregoing instrument, and the said instrument was signed on behalf of said companies and by him personally, and that Robert E. Sigler as such acknowledged the execution of said instrument to be a voluntary act indeed by him executed.

(s) Martin F. Gibbons
Notary Public, Wayne County, MI.
Acting in Macomb County, Michigan
My Commission Expires Aug. 21, 1983

Appendix H

SUPPLEMENTAL AFFIDAVIT OF ROBERT E. SIGLER

STATE OF MICHIGAN)
) ss.
COUNTY OF OAKLAND)

Robert E. Sigler, being first duly sworn, deposes and says:

1. I am now, and continuously since March, 1976, have been the Director of Payroll of each of the above-referenced Defendant companies (hereinafter collectively the "Company"). I have reviewed the Company's Answer to Plaintiff's Motion for Partial Summary Judgment or, In the Alternative, Preliminary Injunction and the Memorandum in Support thereof. I am personally familiar with the facts stated therein and if called as a witness am competent to testify from personal knowledge as to those facts, which facts are true to the best of my knowledge, information and belief.

2. I file this Affidavit in conjunction with and supplemental to my earlier Affidavit filed in this matter dated June 19, 1980, and specifically refer the Court to that Affidavit.

3. In my position as the Company's Director of Payroll, I was, and remain to this date, primarily responsible for coordinating the audit with Plaintiffs' auditors, which audit forms the subject matter of the above-referenced action.

4. Immediately prior to the commencement of Plaintiffs' audit, I met with Plaintiffs' auditors at the Company's Sterling Heights, Michigan offices. During that meeting, I detailed for Plaintiffs' auditors the documents which would be presented by the Company, the use made by the Company of each set of documents and the origin and method of preparation of each set of documents.

5. During the course of Plaintiffs' audit, from approximately February 4, 1980 through March 28, 1980, I produced and presented to Plaintiffs' auditors on behalf of the

Company, the employment records on all of the Company's employees covered by the applicable Collective Bargaining Agreements.

6. Each of the above-referenced documents are compiled and maintained by the Company by employee name, by separate company and by separate local.

7. At no time during Plaintiffs' audit, which encompassed approximately two months, did Plaintiffs' auditors request additional documents or dispute the documents which I presented to them.

8. To my knowledge, neither Plaintiffs nor Plaintiffs' auditors have requested "resolvement" by the individual local unions and the company of any questions of "coverage" under the applicable Collective Bargaining Agreements, pursuant to the express language of Article 10 of Plaintiffs' Delinquent Account/Employer Audit manual.

9. I have been informed that Plaintiffs presently demand to review for audit purposes the following records of the Company:

(a) 941 Quarterly Earning Reports;

(b) Insurance Exception Listings for calendar years 1977 through 1979;

(c) Payroll Registers and Payroll Journals;

(d) Specific information regarding four (4) of the Company's employees listed on the office payroll but thought to be covered employees;

(e) Names of all office employees so that Plaintiffs can verify if such employees are actually members of the Union; and

(f) Names of employees who were employed at the Chicago, Illinois location.

10. With the exception of paragraph 9(b) hereinabove, the documents presently requested by Plaintiffs include, by their manner of preparation, confidential information regarding approximately sixty (60%) percent of the Company's employees who are not members of any union, are not "covered" by any Collective Bargaining Agreement and, therefore, are not eligible for contributions to the Trust Fund by the Company.

11. Contrary to paragraphs 4 and 5 of the Affidavit of John P. O'Sullivan submitted by Plaintiffs in Support of their Motion, the Company denies the stated indebtedness to the Plaintiffs' [sic] furthermore a more specific response to these allegations is impossible because Plaintiffs have failed to state specific facts, detail specific individuals, or in any way factually explain these allegations.

FURTHER DEPONENT SAITH NOT.

(s) ROBERT E. SIGLER
Director of Payroll of each
Defendant Company

Appendix H

STATE OF MICHIGAN)
) ss.
COUNTY OF OAKLAND)

On this ____ day of October, 1980 before me, the undersigned, a Notary Public in and for Macomb County, Michigan, personally appeared Robert E. Sigler, to me known, who by me being first duly sworn, did say that he is the Director of Payroll of each of the companies so listed as Defendants in the above-captioned action, and the individual executing the within and foregoing instrument, and that said instrument was signed on behalf of said companies and that Robert E. Sigler as such acknowledged the execution of said instrument to be a voluntary act and deed by him executed.

(s) MARTIN F. GIBBONS
Notary Public, Wayne County, MI.
Acting in Macomb County, Michigan
My commission expires: Aug. 21, 1983

*All Affidavits are captioned in identical manner.

APPENDIX 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Plaintiff,

v.

Civil No. 82-71080

THEUT PRODUCTS, INC.,
a Michigan corporation,
Defendant.

ORDER

This action was filed on behalf of the trustees of the Central States, Southeast and Southwest Areas Pension Fund (Central States), to (1) compel Theut Products, Inc. (Theut), to produce sufficient documents to enable Central States' auditors to verify the accuracy of reporting by Theut and to determine independently that all employees of Theut actually performing bargaining unit work, regardless of union membership, were receiving contributions on their behalf pursuant to operative collective bargaining agreements with various local unions affiliated with the International Brotherhood of Teamsters and in accordance with applicable agreements, and (2) to collect any sums found to be owing (if any) as a result of the audit.

Central States contends that the Employee Retirement Income Security Act of 1974 (29 U.S.C. §1001, *et seq.*) (ERISA) requires pension funds to award credited service and grant benefits solely on the basis of actual work performance regardless of whether an employee has made contributions on such employee's behalf and that it is not required to rely on an employer's reports.

Theut takes a contrary position.

Theut's motion to stay proceedings pending a determination by the Court of Appeals for the Sixth Circuit of Central States' right to determine the scope of an audit in a related (though factually distinguishable) case, *Central States, Southeast and Southwest Areas Pension Fund* v. *Central Transport*, 522 F. Supp. 658 (E.D. Mich. 1981), has been denied. Central States has filed a motion to compel more complete discovery (than that voluntarily agreed to by Theut). Central States relies on Fed. R. Civ. P. 26(b), 34, and 37. Theut's answers to Central States' interrogatories indicate that the discovery of employment-related records of any employees asserted by Theut not to be in the bargaining unit will not be permitted without a court order. Central States has represented that independent verification of reporting accuracy and the constituency of the bargaining unit cannot be effected without access to certain records pertinent to Theut's total workforce. Central States' motion for more complete discovery and Theut's motion for a protective order are before the Court.

The Court has read the pleadings submitted by both parties, and heard oral arguments on September 13, 1982. Theut is to comply with Central States' request for the discovery of the records sought in its interrogatories and in their notice for production of documents subject to the following:

(1) Theut is to make available to Central States' auditors authenticated and detailed copies of IRS 941 forms (as submitted to the Internal Revenue Service) for the years 1977 to the present.

(2) For those years in which the names of the employees of Theut were not required to be submitted on 941 forms, individual earnings records (IRS W-2 forms) are to be made available. (Paragraphs (1) and (2) together will allow the auditors to independently verify the constituency of the complete employee population so that the names (on authenticated documents) can be compared with the fund's

own records based on Theut's monthly reporting forms as well as with those in Theut's payroll registers.)

(3) Complete payroll registers are to be made available subject to the safeguards set forth below. (These registers are necessary in order for the auditors to determine whether a given employee worked during a given week so that contributions would be owed if that employee were performing bargaining unit work. This information cannot be ascertained from 941 or W2 forms).

(4) Central States' auditors are to be permitted access to Theut's records to determine the job status of employees stated by Theut not to belong to the bargaining unit.

(5) Should discrepancies or ambiguities arise with regard to an individual's employment duties, Theut shall make available other data confirming job status such as driver's manifests, trip logs, lease agreements or other items specified in Central States' motion to produce documents.

(6) To protect the confidentiality of employee records: a) any audit is to be conducted at the premises of Theut; b) no employee records are to be copied or reproduced or withdrawn from Theut's premises once the auditors have determined independently that these employees are not performing bargaining unit work.

(7) None of the information obtained shall be transmitted to third parties, such as local unions, without the express consent of Theut.

(8) Review of records of employees not classified by Theut as performing bargaining unit work is limited to independently identifying job classification and eligiblity.

(9) Personnel data relevant to determining employment status shall include information concerning hiring date, lay-off or termination dates (if relevant), position for which applied, and salary. Personal data not relevant to the verifi-

cation of an employee's job classification and actual work performance need not be supplied.

(10) No address of any employee need be supplied. If an address is contained in any of the required documents, such address may be blocked out.

(11) With regard to corporate officers or directors, Theut may block out the individual salaries of such persons on any forms produced (eg. 941 forms, W-2 forms, payroll registers, personnel files). However, documentation authenticating the status of such persons shall be produced.

(12) To the extent that Theut believes any particular item required to be produced under this order is not necessary to reasonably enable Central States to determine whether Theut is accurately reporting Theut may apply to the Court for modification.

SO ORDERED.

(s) AVERN COHN
United States District Judge

DATED: Oct. 21, 1982
Detroit, Michigan

APPENDIX J

SHELDON M. MEIZLISH
Attorney at Law
1166 First National Building
Detroit, Michigan 48226
(313) 964-3430

May 19, 1983

Russell N. Luplow, Esq.
505 Woodward Avenue, Ste. 3400
Bloomfield Hills, Michigan 48013

Re: Central States, Southeast and Southwest Areas Pension Fund and Central States, Southeast and Southwest Areas Health and Welfare Fund vs. Central Transport, Inc., et al., C. A. 6, No. 81-1757

Dear Mr. Luplow:

It is my understanding that Central States, Southeast and Southwest Areas Pension Fund and Central States, Southeast and Southwest Areas Health and Welfare Fund, your clients, will be filing a petition for writ of certiorari.

The Bricklayers Fringe Benefit Funds, Metropolitan Area, et al., as you will recall, filed a memorandum *amici curiae* in support of the petition for rehearing you filed with the U.S. Court of Appeals for the Sixth Circuit.

If and when a petition for writ of certiorari is filed, my clients desire to submit an *amici curiae* brief in support of your petition.

Pursuant to Rule 36 of the Rules of the Supreme Court of the United States, I hereby request your consent to submit such brief.

Very truly yours,

Sheldon M. Meizlish

SMM:cf

Appendix J

FEDER & EDES
1527 18th Street, N. W.
Washington, D. C. 20036
(202) 387-1515

David R. Levin June 8, 1983

FEDERAL EXPRESS

Russell N. Luplow, Esquire
Suite 3400
505 Woodward Avenue
Bloomfield Hills, Michigan 48013

Re: *Central States, Southeast and Southwest Areas Pension Fund, et al.* v. *Central Transport, Inc., et al.*

Dear Mr. Luplow:

This firm is counsel to the National Coordinating Committee for Multiemployer Plans, a nonprofit organization consisting of more than one hundred forty multiemployer plans or their sponsors. Because the issues involved in *Central States* v. *Central Transport* are of major importance to NCCMP affiliates, the NCCMP wishes to file an *amicus curiae* brief in support of the petition for certiorari.

Therefore, pursuant to Rule 36 of the Rules of the Supreme Court, I hereby request the consent of the petitioners to the NCCMP's participation as an *amicus curiae* in this case.

Thank you for your cooperation in this matter.

Sincerely,

David R. Levin

DRL/bpa

Appendix J

[ARTHUR YOUNG LETTERHEAD]

June 17, 1983

Russell N. Luplow, Esq.
Russell N. Luplow, P.C.
505 Woodward Avenue
Suite 3400
Bloomfield Hills, MI 48013

Patrick A. Moran, Esq.
Simpson, Moran & Burnett
555 S. Woodward
Birmingham, MI 48011

Re: *Central States, Southeast and Southwest Areas Pension Fund* v. *Central Transport, Inc.*

Gentlemen:

We have been advised that it is the intention of Central States to file a petition for writ of certiorari in connection with the decision in the above-referenced case. Because of the nature of the issue raised by the Court of Appeals for the Sixth Circuit, and its impact on the ability of independent certified public accounting firms to conduct audits of multiemployer plans as required by applicable federal statutes, we request your consent to our filing a brief amicus curiae in support of the Petition for Certiorari.

If you consent to our filing a brief amicus curiae, please sign the original of this letter and return it to me.

Very truly yours,
(s) Carl D. Liggio
General Counsel

I hereby consent to the filing of a brief *amicus curiae* by Arthur Young & Company in the above captioned case.

(s) Russell N. Luplow

Patrick A. Moran